Differential Preemption

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Preemption is a constitutional law doctrine whereby state and local authorities are deprived of their powers in particular areas governed by federal law. In setting the boundaries of state sovereignty within a federal polity, it constitutes one of the pillars of the federal political structure. Viewed differently, preemption is one of the strongest legal unification methods. This Article focuses on a highly important and distinctive niche in preemption debate, namely the interrelation between federal maritime law and state law. It offers an original theoretical framework for maritime preemption analysis, which supports a judicial heuristic standing in stark contrast to that advocated by prominent scholars as the late Professor David Currie. Although maritime preemption remains the source of inspiration and the focal point of this Article, the implications of the main idea are far-reaching. It may be pertinent to allocation of lawmaking powers in other areas and to other types of unification and harmonization methods, and may be applicable in other federal and federal-like systems, such as the European Union.

This Article contends that the preemptive force of federal maritime law should relate to prospective litigants' ability to pre-select the law applicable to their interaction. Maritime preemption is generally based on the need for uniformity. However, and this is crucial, uniformity is not an end in itself, but a means for the protection and advancement of more fundamental federal interests. As the underlying justifications for uniformity weaken, so does the need for preemption. This Article ascertains that if the parties in a particular type of case can easily select applicable law before the occurrence of the legally relevant incident, uniformity becomes unnecessary. Moreover, where pre-selection based on individual preferences is possible, uniformity may be detrimental to the common good, because it curtails regulatory competition. Under these circumstances, uniformity-driven preemption of state law should be avoided. If, on the other hand, pre-selection is impossible or impractical, the need for uniformity resurfaces, and preemption might be warranted.

TABLE OF CONTENTS

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I. INTRODUCTION

Preemption is a constitutional law doctrine whereby state and local authorities are deprived of their powers in particular areas governed by federal law.[1] In setting the boundaries of state sovereignty within a federal polity, it constitutes one of the pillars of the federal political structure. Viewed differently, preemption is one of the strongest legal unification methods.[2]

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[1] *See* JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW 1 (2006).
[2] *See infra* Part III.A.1.

Recent cases like *Williamson v. Mazda Motor of America, Inc.*[3] and *Bruesewitz v. Wyeth LLC*[4] highlight the growing salience of preemption in contemporary legal discourse. This Article focuses on a highly important and distinctive niche in preemption debate, namely the interrelation between federal maritime law and state law. It offers an original theoretical framework for maritime preemption analysis, which supports a judicial heuristic standing in stark contrast to that advocated by prominent scholars such as the late Professor David Currie. Although maritime preemption remains the source of inspiration and the focal point of this Article, the implications of the main idea are far-reaching. It may be relevant to the allocation of lawmaking powers in other areas and to other types of unification and harmonization methods, and may be applicable in other federal and federal-like systems, such as the European Union.

The relative importance of maritime preemption derives mainly from the contribution of maritime activities to the American economy. The United States is a maritime nation, with only two international land borders, and thousands of miles of coastline along two oceans.[5] Shipping and other naval ventures have always played a central role in maintaining and enhancing both national security and economic well-being,[6] although they may have lost some of their gleam with the development of competing means of transportation.[7] In 2008, maritime transportation accounted for 78% of U.S. international trade by volume and approximately 48% by value ($1.62 out of $3.4 trillion).[8] According to the final report of the United States Commission on Ocean Policy, more than thirteen

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[3] 131 S. Ct. 1131, 1134, 1139–40 (2011) (holding that a state tort claim was not preempted by a federal motor vehicle safety regulation).

[4] 131 S. Ct. 1068, 1082 (2011) (holding that the federal Vaccine Injury Act preempts state law design-defect claims against vaccine manufacturers).

[5] *See* Scott C. Truver, *The Law of the Sea and the Military Use of the Oceans in 2010*, 45 LA. L. REV. 1221, 1227 (1985).

[6] *See* Lynn N. Hughes, *An Introduction: Principles and Pragmatism*, 21 TUL. MAR. L.J. 1, 1 (1996).

[7] *Id.*

[8] *See* IHS GLOBAL INSIGHT, AN EVALUATION OF MARITIME POLICY IN MEETING THE COMMERCIAL AND SECURITY NEEDS OF THE UNITED STATES 1, 8–9 (2009), *available at* http://www.ihsglobalinsight.com/gcpath/MARADPolicyStudy.pdf (reporting both that 48% of U.S. international trade by value and 78% by volume was maritime trade); U.S. DEP'T OF TRANSP. MAR. ADMIN., U.S. WATER TRANSPORTATION STATISTICAL SNAPSHOT 9 (2011), *available at* http://www.marad.dot.gov/documents/US_Water_Transportation_Statistical_snapshot.pdf (reporting that 48% of U.S. international trade by value was maritime trade). In 2001, maritime transportation accounted for 78% of U.S. international trade by volume and for more than 38% by value. U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 17 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf. In 1994, maritime transportation accounted for 98% of U.S. international trade by tonnage, and almost half by value. B.J. Haeck, Note, Yamaha Motor Corp. v. Calhoun: *An Examination of Jurisdiction, Choice-of-Laws, and Federal Interests in Maritime Law*, 72 WASH. L. REV. 181, 181 (1997).

million jobs were connected to maritime trade in 2001.[9] Additionally, annual production of oil and gas was valued at $25–40 billion, and the annual value of fishing activities exceeded $28 billion.[10]

The uniqueness of maritime preemption derives from the special nature of general maritime law. A preemption dispute generally hinges on judicial construction of federal legislation. Some federal statutes explicitly preempt state and local powers, and others have been interpreted as implicitly doing so.[11] Following *Erie Railroad v. Tompkins*,[12] general maritime law has remained the only manifestation of traditional federal common law.[13] Maritime law is consequently the only area in which state law may be preempted by federal purely judge-made law, rather than federal legislation or constitutional provisions.[14] Put differently, preemption in maritime law may be mandated by a non-representative, politically unaccountable body.[15]

This Article contends that the preemptive force of federal maritime law should relate to prospective litigants' ability to preselect the law applicable to their interaction. Maritime preemption is generally based on the need for uniformity. However, and this is crucial, uniformity is not an end in itself, but a means for the protection and advancement of more fundamental federal interests. As the underlying justifications for uniformity weaken, so does the need for preemption. This Article ascertains that if the parties in a particular type of case can easily select applicable law before the occurrence of the legally relevant incident, uniformity becomes unnecessary. Moreover, where pre-selection based on individual preferences is possible, uniformity may be detrimental to the common good because it curtails regulatory competition. Under these circumstances, uniformity-driven preemption of state law should be avoided. If, on the other hand, pre-selection is impossible or impractical, the need for uniformity resurfaces, and preemption might be warranted.

Part II outlines the current legal framework. Preemption analysis is required only where the states and the federal government have concurrent powers. Where federal powers are exclusive, no preemption dispute can arise because there is no state power to be preempted.[16] Section A presents the competing federal and state powers in the field of maritime law. Section B discusses the

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[9] *See* U.S. COMM'N ON OCEAN POLICY, *supra* note 8, at 2.

[10] *Id.*

[11] *See infra* Part II.B.1.

[12] 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

[13] *See* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 274, 284 (1999) [hereinafter Young, *Preemption at Sea*]. Interpretation and implementation of specific federal legislation is surely an exercise of judicial-lawmaking power, but is clearly different from purely judge-made law. *Id.* at 285. For further discussion of the various forms of federal common law, see Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1642–43 (2008) [hereinafter Young, *Federal Common Law*].

[14] *See* Young, *Preemption at Sea*, *supra* note 13, at 274.

[15] *See id.* at 276, 328–29; *see also infra* Part II.B.2.a.

[16] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994).

principles whereby courts have endeavored to delineate the boundaries between federal and state powers. It first presents the main principles governing preemption controversies, where state law has to confront the underlying policies of specific federal legislation, and then analyzes the special principles developed in maritime jurisprudence, where the federal policy embodied in a particular rule is accompanied by the overarching need for subject-matter uniformity, and federal courts have an undisputed lawmaking power. In particular, it examines the well-known *Jensen* formula,[17] and a few notable distinctions that have been used in maritime preemption analysis. The interrelation between federal and state law is exemplified through a brief appraisal of the law governing liability for economic losses arising from marine oil pollution.

Part III puts forward and defends the new guidepost. Section A provides the building blocks. It explains that the purpose of the Admiralty Clause of the Constitution was to maintain uniformity of maritime law within the United States. This goal has been pursued by recognizing federal lawmaking powers, and cautiously preempting state law. This Article then substantiates the idea that uniformity is not the ultimate end, but a means for advancing more fundamental federal policies. Section B maintains that an inverse relationship should exist between the preemptive force of federal maritime law in a particular type of case and litigants' capacity to preselect applicable law. This Article shows that this argument is theoretically sound and doctrinally tenable. On the theoretical level, it argues that if the parties can preselect applicable law, the federal objectives usually associated with uniformity can be achieved without uniformity, hence without preemption of state law. Private choice of law also has the advantage of facilitating beneficial regulatory competition. On the doctrinal level, the article demonstrates that pre-selection is legally possible, and that the proposed guidepost can be utilized within the existing constitutional framework. Section B then shows that the main thesis can support a judicial heuristic, and explains its qualifications. Generally, in a paradigmatic contractual setting the parties can incorporate a choice-of-law provision into their contract, so no need exists for compelled uniformity. In a paradigmatic tort case, on the other hand, the parties may have been complete strangers prior to the accident, so private choice of law is less likely, and the need for uniformity may arise. Section C demonstrates how the new guidepost can be implemented in real-life situations taken from notable Supreme Court decisions.

[17] *See infra* Part II.A.2.b.

II. THE LEGAL FRAMEWORK

A. *The Competing Powers*

1. *Jurisdiction*

a. *Federal*

Article III, Section 2 of the Constitution, known as the Admiralty Clause, provides that "[t]he judicial power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction."[18] This grant applies to civil maritime cases, whereas criminal admiralty jurisdiction derives from a different constitutional and statutory framework.[19] Thus, the Judiciary Act, originally enacted in 1789, provides that the district courts "shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[20] Admiralty is the only substantive area of law with regard to which the Constitution grants subject-matter jurisdiction to the federal judiciary.[21] Even so, Alexander Hamilton noted that

> [t]he most bigoted idolizers of State authority, have not thus far shown a disposition to deny the National Judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[22]

Admiralty jurisdiction encompasses "all maritime contracts, torts, and injuries."[23] Still, there is a clear distinction between contract and tort cases. Regarding the former, the traditional English rule conceded jurisdiction, with a few exceptions, only to contracts "made upon the sea and to be executed

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[18] U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ."). For a historical account of this provision, see Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925).

[19] *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . . To define and Punish Piracies and Felonies committed on the high Seas.").

[20] 28 U.S.C. § 1333 (2006). For a discussion of the original version of this statute, see THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 2–5 (3d ed. 2001).

[21] *See* Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 381 (1996).

[22] THE FEDERALIST NO. 80, at 437 (Alexander Hamilton) (E.H. Scott ed., 1898); *see also* Theodore F. Stevens, Erie R.R. v. Tompkins *and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 248–49 (1950) (quoting THE FEDERALIST NO. 80, *supra*, at 437).

[23] DeLovio v. Boit, 7 F. Cas. 398, 444 (C.C.D. Mass. 1815) (No. 3776).

thereon."[24] However, since *DeLovio v. Boit*[25] jurisdiction over contracts has extended to all contracts "which relate to the navigation, business or commerce of the sea."[26] Put differently, jurisdiction depends on the subject matter of the contract—maritime or not,[27] regardless of the place of formation and the place of execution.[28] This test was endorsed by the Supreme Court shortly thereafter,[29] and has held sway since.[30]

Admiralty jurisdiction over torts was originally based on locality.[31] Under the locality test a tort fell within maritime jurisdiction only if it occurred on the high seas or other navigable waters,[32] including inland rivers, streams, lakes, and the like.[33] To qualify as "navigable waters," a body of water must be used, or have the potential of being used, for "customary modes of trade and travel," and must, by itself or by uniting with other waters, form a continuous artery for interstate or international commerce.[34]

Initially, the plaintiff had to show that the cause of action was "complete within the locality upon which the jurisdiction depends—on the high seas or navigable waters."[35] Therefore, an action for negligence was not within admiralty jurisdiction if the whole harm was sustained on land.[36] Subsequent decisions made clear that a tort satisfied the locality test if and only if the first significant effect of the defendant's wrong on the plaintiff occurred on navigable waters.[37] However, in 1948 Congress extended admiralty jurisdiction to all cases of damage or injury caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land."[38] While this provision clearly brings ship-to-shore collisions within

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[24] Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 26 (1871).

[25] 7 F. Cas. 398.

[26] *Id.* at 444.

[27] *Id.* at 440; Steven F. Friedell, *Searching for a Compass: Federal and State Law Making Authority in Admiralty*, 57 LA. L. REV. 825, 827 (1997).

[28] *DeLovio*, 7 F. Cas. at 444; Friedell, *supra* note 27, at 827.

[29] Waring v. Clarke, 46 U.S. (5 How.) 441, 459 (1847) (the subject matter in cases of contract determines the jurisdiction); *see also Ins. Co.*, 78 U.S. (11 Wall.) at 26 ("[T]he true criterion is the nature and subject[]matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions.").

[30] *See, e.g.*, Exxon Corp. v. Cent. Gulf Lines, 500 U.S. 603, 610–11 (1991).

[31] *DeLovio*, 7 F. Cas. at 444.

[32] *See* The Plymouth, 70 U.S. (3 Wall.) 20, 34–35 (1865); *DeLovio*, 7 F. Cas. at 420, 444.

[33] *See* SCHOENBAUM, *supra* note 20, at 11; Friedell, *supra* note 27, at 846.

[34] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

[35] *The Plymouth*, 70 U.S. (3 Wall.) at 36.

[36] *Id.*

[37] *See* David W. Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. MAR. L. & COM. 275, 286 (1998).

[38] 46 U.S.C. § 30101 (2006).

admiralty jurisdiction,[39] it does not require physical contact by the vessel. Proximate causation between the vessel's activities and the injury suffices.[40]

In recent decades the Supreme Court has qualified the locality test. In *Executive Jet Aviation, Inc. v. Cleveland*,[41] an airplane crashed into Lake Erie following a collision with a flock of seagulls.[42] The aircraft owner sued the airport operator and airport personnel.[43] Although the incident occurred on or over navigable waters, the Court held that a mechanical application of the locality test might not be sensible and consonant with the purposes of maritime law, and that at least in aviation tort cases, locality was "not a sufficient predicate for admiralty jurisdiction."[44] The Court consequently devised an additional precondition for maritime jurisdiction, allegedly more consistent with the history and purpose of the admiralty grant: "[T]he wrong [complained of must] bear a significant relationship to traditional maritime activity."[45] Despite the specific context of this decision, the maritime nexus requirement currently applies to all tort cases, not only to aviation accidents.[46]

In *Foremost Insurance Co. v. Richardson*, the Court rejected the argument that the wrongful conduct must have a substantial relationship to commercial maritime activity.[47] It explained that while the primary focus of admiralty jurisdiction was the protection of maritime commerce, this federal interest would not be adequately served if admiralty jurisdiction was restricted to "individuals actually engaged in commercial maritime activity."[48] This is because noncommercial maritime activities may also affect maritime commerce.[49] The Court concluded that a collision between two pleasure boats on navigable waters had a significant relationship with maritime commerce due to its potential disruptive impact on such commerce.[50] In an extremely influential footnote the Court further explained that not every accident that might be disruptive to maritime commerce falls within admiralty jurisdiction. Rather, admiralty jurisdiction is appropriate if "potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity."[51]

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[39] *See, e.g.*, United States v. Matson Navigation Co., 201 F.2d 610, 615–16 (9th Cir. 1953).

[40] *See, e.g.*, *In re* Oil Spill by Amoco Cadiz, 699 F.2d 909, 913 (7th Cir. 1983) (finding shoreline damages caused by a marine oil spill within jurisdiction).

[41] 409 U.S. 249 (1972).

[42] *Id.* at 250.

[43] *Id.* at 251 n.2.

[44] *Id.* at 261.

[45] *Id.* at 268.

[46] *See* Foremost Ins. Co. v. Richardson, 457 U.S. 668, 673–74 (1982).

[47] *Id.* at 674.

[48] *Id.* at 674–75.

[49] *Id.* at 675.

[50] *Id.*

[51] *Foremost Ins.*, 457 U.S. at 675 n.5.

In *Sisson v. Ruby*,[52] the Court endorsed this footnote, formulating a two-prong maritime nexus test[53] that has been reaffirmed in subsequent cases.[54] First, the type of incident must have a potentially disruptive impact on maritime commerce.[55] The judicial inquiry turns on the possible impact of a type of incident, not on the actual effects of the particular incident[56]: "[A] court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity."[57] Moreover, the relevant class of incidents must pose "more than a fanciful risk" to maritime commerce.[58] Second, the general character of the activity giving rise to the incident must bear a substantial relationship to traditional maritime activity.[59] According to *Foremost*, a substantial relationship to traditional maritime activity need not necessarily involve a commercial activity.[60] Indeed, the Court in *Foremost* concluded that operating a pleasure boat satisfies the "substantial relationship" test.[61] Additionally, under *Sisson*, a substantial relationship to traditional maritime activity need not necessarily involve navigation and may exist even with respect to "other activities traditionally undertaken by vessels, commercial or noncommercial,"[62] including docking.[63]

In conclusion, a party seeking to invoke admiralty jurisdiction over a tort case must establish that (1) the tort occurred on navigable waters, or the injury was "caused by a vessel on navigable waters"; (2) the type of incident, generally defined, has a potentially disruptive impact on maritime commerce; and (3) the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.[64]

b. *State*

The Judiciary Act, as amended, qualifies the grant of exclusive admiralty jurisdiction to federal courts by "saving to suitors in all cases all other remedies to which they are otherwise entitled."[65] The "saving to suitors" clause is generally interpreted as giving state courts concurrent jurisdiction in

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[52] 497 U.S. 358 (1990).

[53] *Id.* at 362–64.

[54] *See, e.g.*, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 538–39 (1995).

[55] *Sisson*, 497 U.S. at 362–63; *see also Grubart*, 513 U.S. at 534, 538.

[56] *Sisson*, 497 U.S. at 363.

[57] *Id.*

[58] *Grubart*, 513 U.S. at 539.

[59] *Sisson*, 497 U.S. at 364–65.

[60] *See supra* notes 58–61 and accompanying text.

[61] Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674 (1982).

[62] *Sisson*, 497 U.S. at 366–67.

[63] *Id.* at 367.

[64] Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 533–34 (1995).

[65] 28 U.S.C. § 1333 (2006).

admiralty.[66] So subject to a few exceptions enumerated below, this provision enables plaintiffs in maritime cases to sue in state courts.[67]

State courts do not have concurrent jurisdiction in two types of cases. First, federal courts have exclusive jurisdiction over distinctive admiralty remedies and procedures unknown to land-based common law, such as in rem proceedings against vessels[68] and possibly the more unusual actions relating to salvage awards,[69] general average contributions,[70] and prizes (that is, confiscation of enemy vessels).[71] Second, specific maritime statutes extend exclusive jurisdiction to federal courts.[72] These include the Limitation of Shipowner Liability Act,[73] the Ship Mortgage Act,[74] the Suits in Admiralty Act,[75] the Public Vessels Act,[76] and the Foreign Sovereign Immunity Act.[77]

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[66] *See* SCHOENBAUM, *supra* note 20, at 99; David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 169; David W. Robertson, *The Applicability of State Law in Maritime Cases After* Yamaha Motor Corp. v. Calhoun, 21 TUL. MAR. L.J. 81, 84 (1996) [hereinafter Robertson, *Applicability of State Law*]; David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325, 328, 332 (1995) [hereinafter Robertson, *Displacement of State Law*]; Stevens, *supra* note 22, at 251–52 (discussing the views of Story and Dodd).

[67] *See* Young, *Preemption at Sea*, *supra* note 13, at 283.

[68] Many maritime rights can be enforced in rem against the vessel or in personam against the owner, but a suit in rem may be brought only in an admiralty court. *See* Madruga v. Superior Court, 346 U.S. 556, 560 (1954); Currie, *supra* note 66, at 170; Friedell, *supra* note 27, at 839; Gordon W. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065, 1081 (1983); Stevens, *supra* note 22, at 263.

[69] *See* Simmons v. The Steamship Jefferson, 215 U.S. 130, 137 (1909) ("The claim which the libel asserted was for salvage compensation, and it therefore presented a character of action cognizable exclusively by a court of admiralty of the United States."); Metro. Dade Cnty. v. One Bronze Cannon, 537 F. Supp. 923, 928–29 (S.D. Fla. 1982) (explaining that a salvage action is within the exclusive jurisdiction of the federal admiralty court); O'Neill v. Schoenbrod, 355 So. 2d 440, 440 (Fla. Dist. Ct. App. 1978) (same); 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 123 (7th ed. 2010), *available at* Lexis (same).

[70] *See* SCHOENBAUM, *supra* note 20, at 99 n.4.

[71] *See id.* at 8.

[72] *See* Currie, *supra* note 66, at 170.

[73] 46 U.S.C. §§ 30501–30512 (2006). Section 30511 provides that the owner of a vessel may bring an action under this Act in a federal district court.

[74] *Id.* §§ 31301–31343. Under § 31325(c), the district courts have exclusive jurisdiction over the enforcement of preferred mortgage liens in in rem actions.

[75] *Id.* §§ 30901–30918. Section 30906(a) provides that a civil action under this Act shall be brought in a federal district court. *See also* Amell v. United States, 384 U.S. 158, 159 (1966) ("The Suits in Admiralty Act vests exclusive jurisdiction in the district courts when the suit is of a maritime nature.").

[76] 46 U.S.C. §§ 31101–31113 (authorizing maritime claims against the United States). Section 31104(a) provides that a civil action under this Act shall be brought in a federal district court.

[77] 28 *id.* § 1330 (applying to maritime claims against foreign countries); *see also* Collett v. Socialist Peoples' Libyan Arab Jamahiriya, 362 F. Supp. 2d 230, 234 (D.D.C.

2. *Lawmaking*

a. *A General Comment on Applicable Law*

According to the traditional stance, the constitutional grant of admiralty jurisdiction to the federal courts was also intended to determine applicable law:

> The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."[78]

Thus, when a federal court acquires admiralty jurisdiction it must apply substantive maritime law.[79] Generally, in the absence of a relevant federal statute, general maritime law as developed by the federal judiciary should apply.[80] Moreover, as admiralty jurisdiction was granted to facilitate subject-matter uniformity, the same substantive law must be applied to maritime disputes by federal courts exercising diversity jurisdiction.[81] So the only difference between admiralty and diversity courts in settling maritime cases is procedural.[82]

Finally, under the reverse-*Erie* doctrine state courts hearing maritime cases are expected to apply or at least comply with federal maritime law, to an extent to be discussed below.[83] Just as the *Erie* doctrine compels federal courts to

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2005) (finding federal jurisdiction exclusive); Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 42 (D.D.C. 2000) (same).

[78] The Lottawanna, 88 U.S. (21 Wall.) 558, 574 (1874).

[79] *See* E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law." (citing Exec. Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 255 (1972))); *see also* Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 206 (1996) (same); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545 (1995) (same).

[80] *See E. River S.S.*, 476 U.S. at 864 (citing United States v. Reliable Transfer Co., 421 U.S. 397, 407 (1975)).

[81] *See* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 411 (1953) ("[T]he substantial rights . . . are not to be determined differently whether [the] case is labelled [sic] 'law side' or 'admiralty side' on a district court's docket."); Garrett v. Moore-McCormack Co., 317 U.S. 239, 244 (1942) ("[F]ederal courts, when treating maritime torts in actions at law rather than in suits in admiralty, have also sought to preserve admiralty principles . . . ."); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918) (rejecting an attempt to apply New York law in a diversity jurisdiction case concerning a maritime injury); Robertson, *Displacement of State Law*, *supra* note 66, at 335–36 (explaining that diversity courts should apply maritime law); Stevens, *supra* note 22, at 267–69 (same).

[82] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 335–36.

[83] *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986) ("[S]ubstantive remedies afforded by the States [should] conform to governing federal maritime standards." (citing William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 34

apply state law in diversity cases, the reverse-*Erie* doctrine compels state courts to apply federal law in maritime cases. In *Panama Railroad Co. v. Johnson*,[84] the Court opined that the purpose of the Framers was "to place the entire subject—its substantive as well as its procedural features—under national control."[85] But in *American Dredging Co. v. Miller*,[86] it endorsed the view that state courts may apply their own procedural standards in maritime cases.[87]

b. *Federal Lawmaking*

The Constitution granted admiralty jurisdiction to the federal courts, but did not explicitly confer any lawmaking powers. Jurisdictional grants do not necessarily come with the capacity to create substantive law, as diversity jurisdiction clearly demonstrates.[88] One could argue that as there is no difference between the language of the diversity grant and that of the admiralty grant,[89] they should be similarly construed.[90] But the two grants seem to differ in their underlying purposes. The common stance is that diversity jurisdiction was intended to provide a neutral forum for litigants, whereas admiralty jurisdiction was intended primarily to secure uniformity of substantive maritime law.[91] The distinction is reinforced by the fact that diversity jurisdiction is based

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(1963) (discussing the reverse-*Erie* doctrine))); Lizabeth L. Burrell, *Application of State Law to Maritime Claims: Is There a Better Guide than* Southern Pacific Co. v. Jensen*?*, 21 TUL. MAR. L.J. 53, 53–54 (1996) (explaining that state courts must apply federal maritime law to cases within admiralty jurisdiction); Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 532 (1954) ("[T]he state courts in saving clause cases must respect the same principles of substantive obligation which the federal courts enforced in admiralty."); Robertson, *Displacement of State Law*, *supra* note 66, at 332–37 (explaining and discussing the reverse-*Erie* doctrine).

[84] 264 U.S. 375 (1924).

[85] *Id.* at 386.

[86] 510 U.S. 443 (1994).

[87] *Id.* at 453–54; *see also* Burrell, *supra* note 83, at 71–72; Robertson, *Displacement of State Law*, *supra* note 66, at 347, 357, 359–61.

[88] *See* Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981) ("The vesting of [diversity] jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law . . . .").

[89] Both derive from U.S. CONST. art. III, § 2 ("The judicial power shall extend to . . . .").

[90] *See, e.g.*, Young, *Federal Common Law*, *supra* note 13, at 1672–73 ("Like the . . . grants of diversity jurisdiction, the Admiralty Clause . . . and its statutory counterparts are mere grants of jurisdiction, without any reference to substantive lawmaking authority."); Young, *Preemption at Sea*, *supra* note 13, at 346 ("[J]urisdictional grants do not confer power to fashion substantive rules of decision . . . .").

[91] *See* Currie, *supra* note 66, at 163 (discussing this distinction). Providing a neutral forum may be a subsidiary purpose of the admiralty grant. *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 546 n.6 (1995) ("[W]e are unwilling to rule out that the first Congress saw a value in federal admiralty courts beyond fostering uniformity of substantive law, stemming, say, from a concern with local bias similar to the presupposition for diversity jurisdiction.").

on "the nature of the parties," whereas admiralty jurisdiction is based on the subject matter of the conflict.[92]

It is widely accepted that the purpose of the admiralty jurisdiction grant was to ensure uniformity in maritime law.[93] This naturally entails the maintenance and development of a uniform body of national law. Thus, it is nearly beyond doubt that the Admiralty Clause empowered federal courts not only to draw on substantive maritime law but also "to continue the development of this law within constitutional limits."[94] Some contend that federal lawmaking power in admiralty may derive directly from "strong federal interests in uniform rules to govern maritime commerce," rather than indirectly from the jurisdictional grant.[95] Be that as it may, the existence of a lawmaking power is rarely disputed. The importance of this role was emphasized by Justice Brennan in *The Tungus v. Skovgaard*[96]: "Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases."[97]

The Constitution does not explicitly grant Congress any power with respect to civil maritime law.[98] Nonetheless, the Supreme Court has consistently held that the Constitution implicitly empowers Congress to legislate in this field.[99] The legislative power derives, first and foremost, from a combination of the Admiralty Clause and the Necessary and Proper Clause. The former vests the power to adjudicate maritime cases in the federal judiciary,[100] and the latter empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . [all] Powers vested by this Constitution in the

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[92] *See* J.A.C. Grant, *The Search for Uniformity of Law*, 32 AM. POL. SCI. REV. 1082, 1091 (1938).

[93] *See* Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 CASE W. RES. L. REV. 1, 2 (1997); Swanson, *supra* note 21, at 380; Haeck, *supra* note 8, at 202.

[94] Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 360–61 (1959); *see also* Currie, *supra* note 66, at 162 ("[The admiralty grant] gives the federal courts power to evolve and apply a national substantive law . . . ."); Robertson, *Applicability of State Law*, *supra* note 66, at 82 (citing *Romero*, 358 U.S. at 360–61); Robertson, *Displacement of State Law*, *supra* note 66, at 326,("[The Constitution] empower[s] the federal courts . . . to create a body of national maritime law"); *id.* at 366 ("Admiralty's traditions emphasize the authority and duty of federal judges to create maritime law."); Young, *Federal Common Law*, *supra* note 13, at 1642 ("[F]ederal courts have treated the grant of admiralty jurisdiction as creating a wide-ranging common law jurisdiction.").

[95] Young, *Federal Common Law*, *supra* note 13, at 1643–44.

[96] 358 U.S. 588, 611 (1959).

[97] *Id.* at 611 (citing Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1954)).

[98] On the other hand, the Constitution empowers Congress to define and punish maritime offenses. U.S. CONST. art. I, § 8, cl. 10.

[99] *See infra* notes 102–03, 105; *see also* Washington v. W.C. Dawson & Co., 264 U.S. 219, 227 (1924) ("Congress has power to alter, amend or revise the maritime law . . . .").

[100] U.S. CONST. art. III, § 2.

Government of the United States, or in any Department or Officer thereof."[101] The Court explained in *Southern Pacific Co. v. Jensen*[102] that "in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."[103] Additionally, the legislative power may be inferred from the Commerce Clause,[104] which allocates to Congress the power to "regulate Commerce with foreign Nations, and among the several States," and arguably covers maritime commerce.[105]

Congress's legislative power is subject to constitutional constraints. For instance, maritime legislation cannot encompass issues that do not fall within admiralty subject-matter jurisdiction.[106] A more interesting question is whether Congress can delegate lawmaking powers to the states. In *Knickerbocker Ice Co. v. Stewart*,[107] the plaintiff brought an action for a maritime accident under the Workmen's Compensation Law of New York, based on a 1789 amendment of the Judiciary Act, whereby the "saving to suitors" clause shall encompass "the rights and remedies under the workmen's compensation law of any State."[108] The Court struck down this amendment, holding that Congress cannot delegate lawmaking powers to the states in a way that imperils constitutionally mandated uniformity.[109] Another amendment, which permitted application of state workmen's compensation laws to maritime injuries incurred by non-crew employees, was struck down for the same reason.[110]

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[101] *Id.* art. I, § 8, cl. 18.

[102] 244 U.S. 205 (1917).

[103] *Id.* at 215; *see also* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 361 (1959) (explaining that Article III empowered Congress to "revise and supplement the maritime law"); Panama R.R. Co. v. Johnson, 264 U.S. 375, 385–86 (1924) ("[T]he provision was regarded . . . as implicitly investing [legislative] power in the United States."); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 157–58 (1920) (quoting *Jensen*, 244 U.S. at 215, 225); Harrington, *supra* note 93, at 20, 30 (explaining that Congress's power may derive from the Admiralty Clause and the Necessary and Proper Clause); Robert D. Peltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L.J. 103, 130 (1996) (same); Robertson, *Applicability of State Law*, *supra* note 66, at 82 (same); Robertson, *Displacement of State Law*, *supra* note 66, at 326 (same).

[104] U.S. CONST. art. I, § 8, cl. 3.

[105] *See id.*; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The power of Congress, then, comprehends navigation . . . so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States . . . .'"); Burrell, *supra* note 83, at 53 & n.1 (explaining that Congress's power derives from the Commerce Clause); Harrington, *supra* note 93, at 20 (same); Paulsen, *supra* note 68, at 1082 (same); Robertson, *Displacement of State Law*, *supra* note 66, at 326 n.1.

[106] *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 55 (1932).

[107] 253 U.S. 149 (1920).

[108] *Id.* at 156 (internal quotation marks omitted).

[109] *Id.* at 163–64.

[110] Washington v. W.C. Dawson & Co., 264 U.S. 219, 227–28 (1924); *see also* Harrington, *supra* note 93, at 47.

c. *State Lawmaking*

States have a legitimate concern over maritime activities that take place or have an effect within state borders, including inland waters and territorial sea,[111] and have consequently passed a great deal of legislation on these matters.[112] The conventional view is that admiralty jurisdiction does not automatically prohibit or displace state regulation of maritime activities.[113] First, the "saving to suitors" clause of the Judiciary Act is interpreted not only as conferring concurrent jurisdiction in admiralty on state courts, but also as recognizing states' legitimate role in regulating maritime affairs.[114] Second, as is evident from the analogous Commerce Clause jurisprudence, states' residual lawmaking power may derive from their well-established police powers.[115] The Supreme Court made clear in *Sligh v. Kirkood*[116] that "there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject."[117] State police power embraces regulations designed to promote public health, morals, and safety, as well as public convenience or general prosperity—within a state.[118] State maritime legislation frequently falls within the states' police powers.[119]

In the end, therefore, substantive maritime law may include state law subject to the overarching need for national uniformity and other federal interests.[120] Federal courts have on many occasions applied state laws to maritime disputes.[121] They have done so mainly where federal law was silent, and there was no urgent need to create a new federal rule to fill the lacuna,[122] or where the local interest outweighed the federal interest.[123] For example, in *Yamaha Motor Corp., U.S.A. v. Calhoun*,[124] the Court decided that in the case

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[111] *See* Currie, *supra* note 66, at 169; Harrington, *supra* note 93, at 34; Swanson, *supra* note 21, at 381; Young, *Preemption at Sea*, *supra* note 13, at 329.

[112] *See* Swanson, *supra* note 21, at 381–82.

[113] *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545 (1995) ("[E]xercise of federal admiralty jurisdiction does not result in automatic displacement of state law."); *see also* Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 206 (1996) (citing *Grubart*, 513 U.S. at 545); SCHOENBAUM, *supra* note 20, at 90.

[114] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 328.

[115] *See* Harrington, *supra* note 93, at 33.

[116] 237 U.S. 52 (1915).

[117] *Id.* at 58.

[118] *Id.* at 59 (citing Eubank v. Richmond, 226 U.S. 137, 142 (1912)).

[119] *See* Young, *Preemption at Sea*, *supra* note 13, at 330.

[120] *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545–46 (1995).

[121] Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359–61 (1959) (enumerating incidents in which federal courts applied state law).

[122] *See* Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961); Burrell, *supra* note 83, at 55.

[123] *See Kossick*, 365 U.S. at 741; Burrell, *supra* note 83, at 55.

[124] 516 U.S. 199 (1996).

of a wrongful death of a nonseafarer, plaintiffs could pursue remedies under state law, in excess of the remedies available under maritime law.[125] Moreover, the Court "left open . . . the source—federal or state—of the standards governing liability, as distinguished from the rules on remedies,"[126] at least where injury to or death of nonseafarers on territorial waters is concerned.[127] The crucial question is what the boundaries of state lawmaking powers should be in light of the Constitution and the relevant federal interests or, in other words, when state law is or ought to be displaced by federal law. This is essentially the question of supremacy and preemption to which we now turn.

B. *Setting the Boundaries Between Federal and State Powers*

1. *General Preemption*

Preemption is a constitutional law doctrine whereby "state and local [authorities] are deprived of their powers" in particular areas governed by federal law.[128] The Supremacy Clause of the Constitution posits that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[129] The widely held view is that this clause empowers Congress to preempt state law.[130] According to an alternative yet unconventional stance, the doctrine of preemption derives from the Necessary and Proper Clause mentioned above.[131] Under this clause, if the legislative end is legitimate and "within the scope of the [C]onstitution, all means . . . plainly adapted to that end are constitutional."[132] So if uniformity in a particular area is required to attain other legitimate goals of federal legislation, preemption may be a proper and necessary means of effectuating congressional powers.[133]

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[125] *Id.* at 213–16.

[126] *Id.* at 216 n.14.

[127] *See* Robertson, *Applicability of State Law*, *supra* note 66, at 101.

[128] O'REILLY, *supra* note 1, at 1.

[129] U.S. CONST. art. VI, cl. 2.

[130] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (citing Felder v. Casey, 487 U.S. 131, 138 (1988)); N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 148 n.2 (1917); Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1316 (2004); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000); *see also* Gardbaum, *supra* note 16, at 767, 773 (explaining that Congress's power to preempt state law is assumed to derive from the Supremacy Clause). Gardbaum himself believes that the power to preempt derives from other sources. *Id.* at 773–83.

[131] *See supra* note 101 and accompanying text.

[132] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[133] Gardbaum, *supra* note 16, at 781–83; *see also* Jack W. Campbell IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U. PITT. L. REV. 805, 813–14 (1998) (endorsing Gardbaum's position).

In a preemption analysis the Supreme Court often invokes a "presumption against preemption," whereby state police powers cannot be superseded by a federal statute unless this is "the clear and manifest purpose of Congress."[134] Arguably, this presumption aims to ensure that state power is limited only by federal bodies in which the states are fairly represented.[135] Thus, a preemption dispute generally hinges on congressional intent as manifested in federal legislation.[136]

Preemption may be either explicit or implicit.[137] "Express preemption" occurs when Congress expresses a clear intent to preempt state law.[138] Implicit preemption occurs where preemption is "implicitly contained in [the statute's] structure and purpose."[139] The Court recognized at least two types of implied preemption: (1) "field preemption," where Congress has legislated comprehensively, leaving no room for the states to supplement federal law;[140] and (2) "conflict preemption," where state law conflicts with federal law, namely if compliance with both is physically impossible.[141] Some justices seem to have identified another type—"frustration preemption," which occurs where

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[134] *See* De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 813 n.8 (1997) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1994)); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Ray v. Atl. Richfield Co., 435 U.S. 151, 157 (1978) (quoting *Rice*, 331 U.S. at 230); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 146 (1963) (same); *see also* Mintz v. Baldwin, 289 U.S. 346, 350 (1933).

[135] *See* Young, *Preemption at Sea*, *supra* note 13, at 333–35.

[136] *See Medtronic*, 518 U.S. at 485 ("[T]he 'purpose of Congress is the ultimate touchstone' in every pre-emption case." (quoting Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 103 (1963))); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986) ("The critical question . . . is . . . whether Congress intended that federal regulation supersede state law." (citing *Rice*, 331 U.S. at 230)); Joshua S. Force, Sprietsma v. Mercury Marine: *The Supreme Court Misses the Boat on Maritime Preemption*, 27 TUL. MAR. L.J. 389, 396 (2003).

[137] *See Gade*, 505 U.S. at 98; English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) (distinguishing three types of preemption); *La. Pub. Serv. Comm'n*, 476 U.S. at 368–69 (enumerating various cases of preemption which can be reduced into three or four categories); Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 203–04 (1983) (discussing different types of preemption).

[138] *See Pac. Gas & Elec.*, 461 U.S. at 203 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Force, *supra* note 136, at 396; Harrington, *supra* note 93, at 26. "Approximately 350 federal statutes [explicitly] preempt state law." O'REILLY, *supra* note 1, at 2.

[139] *Gade*, 505 U.S. at 98 (quoting *Jones*, 430 U.S. at 525).

[140] *See id.* (citing Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)); Ray v. Atl. Richfield Co., 435 U.S. 151, 157 (1978) (quoting *Rice*, 331 U.S. at 230); Force, *supra* note 136, at 396; Gardbaum, *supra* note 16, at 808; Harrington, *supra* note 93, at 26.

[141] *See Ray*, 435 U.S. at 158 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)); Force, *supra* note 136, at 396; Gardbaum, *supra* note 16, at 775, 808; Harrington, *supra* note 93, at 26.

state law frustrates the accomplishment of the legislative objectives,[142] but this is usually viewed as a subspecies of conflict preemption.[143]

Not surprisingly, the preemptive effect of federal maritime legislation has been analyzed in accordance with general preemption principles.[144] To the extent that maritime laws are made by Congress, there may be no need for a special preemption doctrine. However, maritime law raises two unique questions that call for distinctive treatment. First, should state law be preempted by contradictory federal judge-made law? Second, could state law be displaced in the absence of any relevant federal rule, on the grounds that it interferes with the constitutional imperative of uniformity embodied in the Admiralty Clause?

2. *Maritime Preemption*

a. *The Need for a Special Doctrine*

As explained above, states have legitimate interests in regulating maritime activities. Naturally, state laws may be incompatible with federal maritime legislation, judge-made maritime law, and the abstract constitutional imperative of uniformity. This potential clash necessitates a constitutionally sound ruling method. While traditional preemption analysis may arguably govern the interrelation between specific federal legislation and state law, it is insufficient in the maritime arena for at least two reasons.

First, maritime law is the only area in which state law may be preempted by federal judge-made law without a concrete legislative anchor.[145] This raises a unique concern. States have a fundamental power to provide for their citizens' welfare.[146] Preemption by Congress may nonetheless be deemed tolerable. To begin with, it is sanctioned by a politically accountable body in which the state is represented.[147] States' representation in federal lawmaking bodies generally insulates their interests.[148] Additionally, the procedural obstacles and complications of the federal legislative process limit the potential reach of this

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[142] *See* Perez v. Campbell, 402 U.S. 637, 649–52 (1971); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Gardbaum, *supra* note 16, at 767 n.3, 808 n.206.

[143] *See Gade*, 505 U.S. at 98 (referring to frustration preemption as a subspecies of conflict preemption); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (same); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (same); *Ray*, 435 U.S. at 158; Harrington, *supra* note 93, at 26 (same).

[144] *See* Green v. Indus. Helicopters, Inc., 593 So. 2d 634, 639 (La. 1992) ("Where Congress has spoken in a particular area, courts engage in the familiar pre-emption analysis."); Young, *Preemption at Sea*, *supra* note 13, at 349–50.

[145] *See* Young, *Preemption at Sea*, *supra* note 13, at 274.

[146] *Id.* at 335.

[147] *Id.* at 335–36.

[148] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 (1985); Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 14 (William W. Buzbee ed., 2009).

type of preemption.[149] These safeguards do not exist with regard to general maritime law. Preemption by judge-made law is more difficult to justify because it circumvents the political safeguard, namely representation of the affected states in the federal lawmaking process, as well as the procedural obstacles.[150] While only a few commentators believe this type of preemption should be abandoned,[151] courts ought to be cautious when considering preemption of state law for lack of conformity with judge-made rules.

Second, general preemption analysis hinges on judicial interpretation of specific federal legislation. Courts examine the language, structure, and legislative history of the statute in hand to determine whether Congress explicitly or implicitly ordered displacement of state law. On the other hand, maritime preemption always involves the general constitutional imperative to maintain uniformity of maritime law within the United States.[152] That is probably why the presumption against preemption mentioned above does not generally apply in maritime contexts.[153] I will elaborate on the constitutional imperative below. At this stage, suffice it to say that, in maritime preemption analysis, an overarching need for subject-matter uniformity accompanies the concrete policy embodied in the relevant federal statute or judge-made rule. This Article focuses mainly on this feature, making the proposed theoretical framework highly pertinent to other legal unification and harmonization projects, in the United States and elsewhere.

It should be emphasized at the outset that while federal law, including judge-made law, is generally supreme under Article VI of the Constitution, admiralty jurisdiction and the resultant federal lawmaking powers do not automatically displace state law.[154] For instance, in *Askew v. American Waterways Operators, Inc.*,[155] the Supreme Court recognized states' interest in oil spill regulation and concluded that Florida's oil spill statute was not preempted by federal law, because only the former provided a remedy for pollution-related loss other than federal cleanup costs.[156]

b. *The* Jensen *Formula*

The exact boundaries of state lawmaking powers with respect to maritime law have been the subject of extensive judicial debate. *Southern Pacific Co. v. Jensen*[157] is the landmark decision on maritime preemption. The dependents of

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[149] *See* Young, *Preemption at Sea*, *supra* note 13, at 337.

[150] *See* Young, *Federal Common Law*, *supra* note 13, at 1657, 1659; Young, *Preemption at Sea*, *supra* note 13, at 276–77, 305, 309, 328–29, 336–37, 343.

[151] *See* Young, *Preemption at Sea*, *supra* note 13, at 279.

[152] *See infra* Part III.A.1.

[153] United States v. Locke, 529 U.S. 89, 108 (2000).

[154] *See supra* Part II.A.2.c.

[155] 411 U.S. 325 (1973).

[156] *Id.* at 328–29, 332–36.

[157] 244 U.S. 205 (1917).

a longshoreman killed while unloading cargo from a ship sued the employer under the New York Workmen's Compensation Act.[158] The defendant contended, inter alia, that allowing recovery under New York law would violate the Admiralty Clause.[159] Justice McReynolds acknowledged, based on *The Lottawanna*,[160] that the Constitution viewed maritime law as "a system of law coextensive with, and operating uniformly in, the whole country," not to be placed "under the disposal and regulation of the several States."[161] On the other hand, he admitted that general maritime law could be modified or affected by state legislation to some extent.[162] The oft-cited conclusion was that "no [state law] is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[163] Hence, state law is preempted in one of three cases: (1) if it conflicts with the express or implied intent of Congress; (2) if it prejudices characteristic features of general maritime law; (3) if it interferes with the harmony and uniformity of maritime law.

The first component of the three-prong test may be implemented in accordance with general preemption principles. Put differently, a court should ask whether state law was explicitly preempted by an act of Congress, and if not whether Congress has legislated comprehensively, leaving no room for the states to supplement federal law, and whether state law conflicts with federal law.[164] In *Yamaha Motor Corp., U.S.A. v. Calhoun*,[165] the Court held without reference to *Jensen* that damages for wrongful death of non-seafarers on state territorial waters may be governed by state statutes because Congress did not prescribe "a comprehensive tort recovery regime to be uniformly applied" to this matter.[166] This language seems consistent with traditional field preemption analysis.

In *American Dredging Co. v. Miller*,[167] the Court instilled some content into the other two components of *Jensen*. It first held that a particular rule or principle is not a characteristic feature of general maritime law if it neither originated nor has exclusive application in maritime law.[168] Applying this test, Justice Scalia concluded that the doctrine of forum non conveniens did not

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[158] *Id.* at 207–10.

[159] *Id.* at 209–10, 212.

[160] 88 U.S. (21 Wall.) 558, 575 (1874).

[161] *Jensen*, 244 U.S. at 215 (internal quotation marks omitted).

[162] *Id.* at 216.

[163] *Id.* In fact, the *Jensen* formulation was taken almost verbatim from *The City of Norwalk*, 55 F. 98, 106 (S.D.N.Y. 1893).

[164] *See supra* notes 137–43 and accompanying text.

[165] 516 U.S. 199 (1996).

[166] *Id.* at 215–16.

[167] 510 U.S. 443 (1994).

[168] *Id.* at 449–50.

originate in maritime law and had become a doctrine of general application.[169] Thus, state refusal to apply this doctrine did not prejudice a "characteristic feature" of the general maritime law.[170] However, it is unclear from *Miller* whether a doctrine must both originate and have exclusive application in maritime law to qualify as a characteristic feature, or if each of the two conditions is sufficient in itself.[171]

The Court also examined whether state law would interfere with "the proper harmony and uniformity" of maritime law in its international and interstate relations.[172] It answered in the negative for two reasons. First, the relevant maritime rule was procedural rather than substantive, and maritime law aims at uniformity of substance—not procedure.[173] Second, "the discretionary nature of the doctrine [and the variety of] factors relevant to its application make uniformity and predictability of outcome almost impossible."[174] And if the maritime doctrine itself does not provide uniformity, it seems unreasonable to preempt contradictory state law for the sake of uniformity.

Jensen has rarely been cited in recent case law and has been discredited by some as being elusive or even redundant,[175] but it has nonetheless retained its vitality for almost a century.[176] Even if not strictly adhered to, *Jensen* remains the guiding light. State law cannot be applied if its application disrupts the essential harmony and uniformity of maritime law, even in the absence of relevant federal legislation.[177] As explained above, substantive law in maritime cases does not normally depend on the particular forum. So *Jensen* and its progeny "appl[y] with equal force in federal and state courts" to limit the validity and applicability of state law.[178]

c. *Practical Distinctions*

Justice McReynolds admitted in *Jensen* that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may

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[169] *Id.*

[170] *Id.* at 450.

[171] *See* Friedell, *supra* note 27, at 843.

[172] *Miller*, 510 U.S. at 450–51.

[173] *Id.* at 453–54.

[174] *Id.* at 453, 455.

[175] *See id.* at 461 (Stevens J., concurring in part and concurring in the judgment) ("We should jettison *Jensen*'s special maritime pre-emption doctrine . . . ."); Robertson, *Applicability of State Law*, *supra* note 66, at 88 n.43 (discussing the critical judicial comments).

[176] *See, e.g.*, *Miller*, 510 U.S. at 447; Askew v. Am. Waterways Operators, Inc., 411 U.S. 325, 344 (1973) ("*Jensen* thus has vitality left."); Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 279 (2d Cir. 2002); *In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1425 (11th Cir. 1997); Rodrigue v. LeGros, 563 So. 2d 248, 252 (La. 1990).

[177] *See* Harrington, *supra* note 93, at 47.

[178] *See* Robertson, *Applicability of State Law*, *supra* note 66, at 87–88; Robertson, *Displacement of State Law*, *supra* note 66, at 331.

be changed, modified, or affected by state legislation."[179] *Jensen* tried to set general guidelines, but the formulation was quite elusive,[180] and the exact boundaries of state power to regulate maritime activities and events have remained somewhat obscure. Many years later, in an oft-cited paragraph, the Court acknowledged that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence."[181] The Louisiana Supreme Court fairly complained that "[d]espite this multitude of cases involving the applicability of state law in maritime situations, the Court has developed no clear test for determining when such application is appropriate and when it violates the [C]onstitution."[182] One commentator, who surveyed all maritime preemption cases from *Jensen* to *Yamaha*, concluded that "the Court's opinions [on maritime preemption] do not give intelligible reasons, just conclusions," and that even if we attempted to discern useful patterns by viewing the aggregate results "this body of jurisprudence discloses few useful patterns."[183] Given the generality of the *Jensen* formula and the case-by-case nature of preemption analysis, the obscurity of the law does not seem surprising. But while there may not be a coherent explanation for the whole body of case law, several distinctions may be helpful.

The first distinction is between rights and remedies. I have explained that the "saving to suitors" clause of the Judiciary Act confers concurrent jurisdiction in admiralty on state courts, but it does so for an express purpose, namely to give maritime suitors access to state law remedies.[184] Thus, states must have much more latitude in supplementing or modifying the available remedies than they have with regard to primary rights and duties. Indeed, one year after *Jensen*, in *Chelentis v. Luckenbach Steamship Co.*,[185] Justice McReynolds proclaimed that "[t]he distinction between rights and remedies is fundamental."[186] Although under the "saving to suitors" clause rights

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[179] S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[180] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 332 ("It is too general and elastic to answer any questions . . . .").

[181] *Miller*, 510 U.S. at 452; *see also* Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 210 n.8 (1996) (citing *Miller*, 510 U.S. at 452); Misener Marine Constr., Inc. v. Norfolk Dredging Co., 594 F.3d 832, 839 n.16 (11th Cir. 2010) (same); Cent. Int'l Co. v. Kemper Nat'l Ins. Cos., 202 F.3d 372, 373 n.1 (1st Cir. 2000) (same); Wells v. Liddy, 186 F.3d 505, 524 n.17 (4th Cir. 1999) (citing *Yamaha*, 516 U.S. at 210 n.8); Bank of San Pedro v. Forbes Westar, Inc., 53 F.3d 273, 275 (9th Cir. 1995) (citing *Miller*, 510 U.S. at 452); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624, 628 (1st Cir. 1994) (adding that "[d]iscerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence").

[182] Rodrigue v. LeGros, 563 So. 2d 248, 253 (La. 1990).

[183] Robertson, *Applicability of State Law*, *supra* note 66, at 90; *see also id.* at 95–96 (showing that any attempt "to synthesize this body of jurisprudence [is] untenable").

[184] *See supra* Part II.A.1.b.

[185] 247 U.S. 372 (1918).

[186] *Id.* at 384.

recognized in maritime law can be enforced through common law remedies, the rights and duties of the parties must always be assessed under federal maritime law.[187] In *Red Cross Line v. Atlantic Fruit Co.*,[188] the Court similarly held that the "saving to suitors" clause actually saved "all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved," but did not sanction "attempted changes by the States in the substantive admiralty law."[189] The Supreme Court's enforcement of state wrongful death legislation may be explained, accordingly, as allowing state remedies for conduct that was already deemed wrongful under maritime law.[190] The distinction between rights and remedies in maritime preemption analysis was challenged in an obiter dictum in *Yamaha*, where in a unique fact situation involving the wrongful death of a non-seafarer, the Court "left open . . . the source—federal or state—of the standards governing liability, as distinguished from the rules on remedies."[191]

The second distinction is between cases in which federal rules apply to the question at hand and cases of lacuna. Common sense dictates more leeway for the states in the latter case. In *Western Fuel Co. v. Garcia*,[192] the Court applied California wrongful death legislation to a fatal accident that occurred on state navigable waters, explaining that maritime law "leaves the matter untouched."[193] This expression was later interpreted as embodying a "gap theory," whereby if federal maritime law provides a rule of decision, whether allowing or denying recovery, state law has no place, but if there is a "gap" or a "void," state law can be applied to fill it.[194] Sometimes Congress explicitly allows gap-filling,[195] but this is not indispensable. The gap theory was applied in subsequent cases. For example, in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*,[196] the Court observed that there was no federal maritime rule on breach of warranties in marine insurance policies,[197] and therefore opted for state insurance law on this matter.[198]

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[187] *Id.*; *see also* Stevens, *supra* note 22, at 252 ("[T]he 'saving clause' was aimed merely at preserving the right of suitors to the remedies of the common law courts, the rights of the parties therein to be derived from a uniform body of general maritime law.").

[188] 264 U.S. 109 (1924).

[189] *Id.* at 123–24.

[190] *See* Currie, *supra* note 66, at 188.

[191] Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 201–02, 216 n.14 (1996).

[192] 257 U.S. 233 (1921).

[193] *Id.* at 240, 242.

[194] *See* Currie, *supra* note 66, at 167.

[195] *See, e.g.*, Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (2006) ("To the extent that they are applicable and not inconsistent with this [Act] or with other Federal laws . . . [the] laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf . . . .").

[196] 348 U.S. 310 (1955).

[197] *Id.* at 314–16.

[198] *Id.* at 321.

The gap theory has also been criticized on various grounds. First, it has limited support in the case law. As one commentator noted, "*Jensen* and its immediate progeny refused to allow state law to fill perhaps the biggest 'gap' that has ever existed in the maritime law—the absence of a workers' compensation remedy."[199] Even when Congress explicitly recognized states' power to provide workmen's compensation for maritime accidents, this empowerment was found unconstitutional.[200] Second, the very distinction between decided and undecided issues is often artificial. The absence of a right of action in maritime law is not necessarily a "void." It may be interpreted as a conscious decision not to recognize that right.[201] Third, in the absence of a concrete maritime rule, federal courts may prefer to create one rather than apply state law,[202] and the gap theory does not tell them which path should be taken in the particular case.[203] Fourth, the outcome generally depends on whether the issue was previously adjudicated,[204] not on a thorough analysis of relevant federal and state interests. This makes the gap theory quite arbitrary.

The third distinction is between predominantly local and predominantly national issues. In *Garcia*,[205] the Court opined that death upon navigable waters within a state "is maritime and local in character," so that state modification of maritime law on this subject does not "work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."[206] Under the "maritime but local" theory, the states may regulate maritime matters that fall predominantly within local concern. It allows state law to apply even in the face of conflicting federal law, as long as the matter is sufficiently local.[207] The rationale seems simple. Regarding incidents of a local nature, national uniformity is not needed because the parties cannot be

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[199] Robertson, *Applicability of State Law*, *supra* note 66, at 96; *see also* Currie, *supra* note 66, at 168 (observing that while wrongful death was an untouched area, "a death remedy" was denied in workmen's compensation decisions).

[200] *See supra* notes 107–10 and accompanying text.

[201] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 341 (explaining that it is often hard to tell the difference between "no rule of recovery" and "a rule of no recovery"). In *Just v. Chambers*, 312 U.S. 383 (1941), the Court examined the applicability of a state survival statute, in view of a maritime law rule that abated a cause of action upon the tortfeasor's death. The respondent said that in *Garcia* there was no maritime wrongful death scheme (a gap), whereas in this case there was a maritime law rule barring survival (no gap). *Id.* at 391. The Court held that "[t]his is a subtlety which we think does not merit judicial adoption. The admiralty rule in the case of wrongful death can be stated either negatively or positively, and the result does not turn on the mere mode of expression." *Id.*

[202] In *Wilburn Boat*, the Court examined whether in the absence of an existing rule it should fashion one, and declined to do so. 348 U.S. at 314, 320.

[203] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 340–41.

[204] *See* Currie, *supra* note 66, at 168.

[205] 257 U.S. 233 (1921).

[206] *Id.* at 242.

[207] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 340.

subjected to varying legal regimes anyway.[208] Of course, this theory may be difficult to apply. On the one hand, almost every conduct and every outcome are of local concern. On the other hand, maritime activities of local concern might have an impact on the federal level. It is therefore hard to determine whether a particular type of incident is sufficiently local.[209] Four decades after *Garcia*, the Court admitted that "[n]o dependable definition of the area—described as 'maritime but local,' or 'of local concern'—where state laws could apply ever emerged from the many cases which dealt with the matter."[210] In fact, cases with similarly local nature were decided differently.[211]

The fourth distinction is between state common law and legislation. Arguably, state statutes have a stronger claim to applicability in maritime cases than state common law because they are generally more coherent and more likely to fall within state police powers, and because they have more democratic roots.[212] *Jensen* itself was actually phrased as a test for state statute validity,[213] even though it was later applied to state law in general, and the distinction between state legislation and common law has some support in the case law.[214] Needless to say, the authorities do not categorically preclude application of state common law.[215]

It is often maintained that the ultimate test for maritime preemption is one of balancing federal and state interests. In *Kossick v. United Fruit Co.*,[216] the Court opined that a preemption analysis is "one of accommodation . . . a process somewhat analogous to the normal conflict of laws situation where two sovereigns assert divergent interests in a transaction as to which both have some concern."[217] Under this view, the court is expected to assure that the federal interest is properly assessed and accorded due weight.[218] This decision has been

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[208] *See* Currie, *supra* note 66, at 179.

[209] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 341.

[210] Calbeck v. Travelers Ins. Co., 370 U.S. 114, 119 (1962).

[211] *See* Robertson, *Applicability of State Law*, *supra* note 66, at 95–96 (showing that a different conclusion was reached in two cases with an equally local nature).

[212] *See* Robertson, *Displacement of State Law*, *supra* note 66, at 345.

[213] *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[214] *See, e.g.*, Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1280 (1st Cir. 1993) ("Maritime law historically has appreciated the leading role of state statutes in creating additional bases of recovery."); Byrd v. Byrd, 657 F.2d 615, 619 (4th Cir. 1981) (explaining that a federal court might be more willing to override a common law rule); *see also* James P. Laughlin, *Choice of Law in the Federal Admiralty Court*, 10 J. MAR. L. & COM. 165, 181 (1979) (presenting the distinction).

[215] *Byrd*, 657 F.2d at 617 ("[A]dmiralty law, at times, looks to state law, either statutory or decisional, to supply the rule of decision where there is no admiralty rule on point.").

[216] 365 U.S. 731 (1961).

[217] *Id.* at 738–39.

[218] *Id.* at 739.

interpreted as endorsing an interest-balancing test.[219] While it may serve as an independent criterion in preemption analysis, some contend that the interest balancing test simply helps determine whether the case is sufficiently local, so that the "maritime but local" test is met.[220] Either way, applying an interest-balancing test within a preemption analysis is extremely difficult because it is frequently hard to identify all relevant interests, and even when identifiable the state interest and the federal interest are generally immeasurable, and clearly incommensurable.[221] Justice Scalia, who discussed the balancing test in the context of the Commerce Clause, concluded: "[I]t is more like judging whether a particular line is longer than a particular rock is heavy."[222]

3. *A Test Case: Economic Loss Arising from Oil Pollution*

a. *Pre-OPA Law*

An interesting example of a discussion of the preemptive force of judge-made maritime law is found in the Exxon Valdez litigation. More than two decades ago the Exxon Valdez ran aground on Bligh Reef off the Alaskan coast, spilling eleven million gallons of crude oil into Prince William Sound.[223] At the time, this was considered the worst environmental disaster in U.S. history.[224] The main question that entailed a preemption analysis in subsequent civil litigation was whether purely economic losses resulting from the spill were recoverable. Aquatic pollutions may have harsh and widespread repercussions. In addition to harm to wildlife and natural resources, property damage, and possibly bodily injuries, various economic losses may ensue. Commercial fishermen, oystermen, crabbers, and the like, may lose their livelihood. Customers of these fishermen, such as seafood restaurants, retail shops, or canned food manufacturers, may incur additional expenses or even shut down temporarily, and suppliers of services and goods to the local fishing industry may lose profit. Owners of shoreline hotels, resorts, recreational areas, and other tourist-based businesses may suffer economic loss. Owners and charterers of ships unable to sail across the area of the spill, as well as owners of cargo

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[219] *See, e.g.*, Green v. Indus. Helicopters, Inc., 593 So. 2d 634, 638 (La. 1992) ("[S]tate law may be applied where the state's interest in a matter is greater than the federal interest."); Friedell, *supra* note 27, at 841; Swanson, *supra* note 21, at 385.

[220] *See* Burrell, *supra* note 83, at 69 (internal quotation marks omitted); Robertson, *Displacement of State Law*, *supra* note 66, at 342. This, in fact, is how the Court in *Kossick*, 365 U.S. at 738–39, used this test.

[221] *See* Friedell, *supra* note 27, at 841; Robertson, *Displacement of State Law*, *supra* note 66, at 343–44; Young, *Preemption at Sea*, *supra* note 13, at 300.

[222] Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[223] Exxon Shipping Co. v. Baker, 554 U.S. 471, 476, 478 (2008).

[224] *See* George J. Church, *The Big Spill: Bred from Complacency, the Valdez Fiasco Goes from Bad to Worse to Worst Possible*, TIME, Apr. 10, 1989, at 38.

delayed by the obstacle, may incur loss. Those involved in the real estate industry in coastal states, such as builders, real estate agents, bankers, and lawyers, may face a decline in business. Suppliers, customers, employees, and relatives of any of the above may lose profits or incur unanticipated expenses.

Alas, purely economic losses are generally irrecoverable in general maritime law under *Robins Dry Dock & Repair Co. v. Flint*[225] and its progeny.[226] This exclusionary rule, when applied to marine pollution, has a single well-defined exception. Courts have consistently allowed commercial fishermen, oystermen, crabbers, etc., to recover for lost fishing profits following a tortious diminution of aquatic life.[227] Thus, in the Exxon Valdez litigation, Exxon's liability to commercial fishermen was undisputed,[228] but other claims were dismissed by the federal district courts under *Robins Dry Dock*.[229]

In an attempt to circumvent the harsh implications of *Robins Dry Dock*, many claimants invoked relevant federal and state legislation. The main federal statutory venue was the Trans-Alaska Pipeline Authorization Act (TAPAA).[230] The Act imposed strict liability for damages resulting from marine pollutions, apparently without the *Robins Dry Dock* limit,[231] but set rigid liability caps. In the case of a discharge from a vessel, liability could not exceed $100 million, of which the owner and operator of the vessel were liable for the first $14 million,

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[225] 275 U.S. 303, 309 (1927).

[226] *See, e.g.*, Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1021 (5th Cir. 1985); Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. ILL. L. REV. 1573, 1578–79.

[227] Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974); *see also, e.g.*, Slaven v. BP Am. Inc., 786 F. Supp. 853, 861 (C.D. Cal. 1992) (holding that the exception was not affected by *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), a products liability case); Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973) (allowing fishermen's recovery under a theory of public nuisance); Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1227–28 (Fla. 2010) (allowing recovery in negligence).

[228] *See In re* Exxon Valdez, No. A89-0095-V, 1994 U.S. Dist. LEXIS 6009, at *21, *23 (D. Alaska Mar. 23, 1994); *In re* Exxon Valdez, 767 F. Supp. 1509, 1511, 1518 (D. Alaska 1991).

[229] *See* Ronen Perry, *Economic Loss, Punitive Damages, and the* Exxon Valdez *Litigation*, 45 GA. L. REV. 409, 457–59 (2011).

[230] 43 U.S.C. §§ 1651–1656 (2006).

[231] *Slaven*, 786 F. Supp. at 858–60; *Exxon Valdez*, 767 F. Supp. at 1515; *In re* Glacier Bay, 746 F. Supp. 1379, 1386 (D. Alaska 1990); *see also In re* Exxon Valdez, No. A89-095, 1992 U.S. Dist. LEXIS 22495, at *13 (D. Alaska Dec. 23, 1992). *But see* Benefiel v. Exxon Corp., No. 90-2184, 1990 U.S. Dist. LEXIS 13251, at *2–3 (C.D. Cal. July 27, 1990) (holding that *Robins Dry Dock* applies to claims under TAPAA). On appeal, the Ninth Circuit affirmed the district court's decision without directly discussing the applicability of *Robins Dry Dock*. It held that plaintiffs' losses were "remote and derivative" and fell "outside the zone of dangers against which Congress intended to protect when it passed TAPAA." Benefiel v. Exxon Corp., 959 F.2d 805, 807 (9th Cir. 1992); *see also* David P. Lewis, Note, *The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?*, 10 ALASKA L. REV. 87, 116–30 (1993) (supporting the district court's position).

and the Trans-Alaska Pipeline Liability Fund was liable for the balance.[232] *Robins Dry Dock* applied to any damages in excess of the $100 million recoverable under the TAPAA.[233]

Some of the claims were based on the Alaska Environmental Conservation Act,[234] which imposes strict liability for damages—including economic losses—caused by an unauthorized release of hazardous substances. A controversy emerged regarding the possible preemption of this provision by general maritime law. Under *Jensen*, state legislation may incidentally affect maritime affairs, unless it "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[235] The district court in Alaska held that *Robins Dry Dock* applied to claims brought against Exxon under the Alaska Act, because state law may not conflict with federal maritime law.[236] Other courts, interpreting comparable legislation in other states in the late 1980s and early 1990s, including the Fifth Circuit, reached similar conclusions.[237]

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[232] Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 204(c)(3), 87 Stat. 576, 587 (1973), *repealed by* Oil Pollution Act of 1990, Pub. L. No. 101-380, § 8102(a)(1), 104 Stat. 484, 565. Although the OPA repealed the liability language of TAPAA applicable to vessel owners and operators, the 1973 Act governed claims arising from the Exxon Valdez spill. § 8102(c), 104 Stat. at 567.

[233] *Exxon Valdez*, 767 F. Supp. at 1515; *see also Exxon Valdez*, 1992 U.S. Dist. LEXIS 22495, at *13.

[234] ALASKA STAT. ANN. §§ 46.03.822–.824 (West 2011).

[235] S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[236] *Exxon Valdez*, 767 F. Supp. at 1515; *see also In re* Exxon Valdez, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20555, at *5–6 (D. Alaska Jan. 26, 1994); *Exxon Valdez*, 1992 U.S. Dist. LEXIS 22495, at *17–20. More accurately, the court held that *Robins Dry Dock* only applied to claims under the Alaska Act against entities not liable under TAPAA and claims against entities liable under TAPAA in excess of TAPAA's $100 million cap. The Alaska Act was technically not preempted by TAPAA to the extent of TAPAA's $100 million liability because the remedy was uniform whether a claim was brought under the Alaska Act or under TAPAA. However, the vessel owner and operator are liable for only $14 million under TAPAA. Thus, in a subsequent decision the same court explained that damages claimed against the vessel-interest-defendants (as opposed to the Fund) under either TAPAA or the Alaska Act in excess of $14 million were subject to the application of *Robins Dry Dock*. *In re* Glacier Bay, 865 F. Supp. 629, 637 (D. Alaska 1991).

[237] *See* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1031–32 (5th Cir. 1985). The court in that case held that the

> federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. We believe that such is the case here. The *Robins* rule has proved to be a workable and useful tool in our maritime jurisprudence. To permit recovery here on state law grounds would undermine the principles we seek to preserve today.

However, both the Supreme Court of Alaska and the Ninth Circuit on appeal from the District Court of Alaska decided that *Robins Dry Dock* did not preempt liability for purely economic loss under state legislation,[238] and this seems to be the dominant view today.[239] According to this stance, the exclusionary rule enunciated in *Robins Dry Dock* is not a "characteristic feature" of maritime law because it neither originated nor has exclusive application in maritime law.[240] Moreover, to determine whether state law "interferes with the proper harmony and uniformity" of maritime law, the court needs to apply a balancing test that weighs state and federal interests on a case-by-case basis.[241] The balance in the case tips in favor of the state: "Alaska's strong interest in protecting its waters and providing remedies for damages resulting from oil spills outweighs the diminished federal interest in achieving interstate harmony through the uniform application of *Robins*."[242] In fact, abrogating *Robins Dry Dock* beyond the $100 million cap under TAPAA would provide greater uniformity than applying one rule up to this cap and another rule above it.[243] Consequently, the Ninth Circuit reversed the district court's rulings on this issue and remanded the case for reconsideration of several economic loss claims under Alaska law.[244] Following this decision, Exxon apparently settled these claims.[245]

b. *The OPA Era*

Congress attempted to enact comprehensive oil pollution legislation from the mid-1970s, and several bills were introduced and discussed by the late

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Id. The court reiterated this stance in a slightly different context in *IMTT-Gretna v. Robert E. Lee Steamship*, 993 F.2d 1193, 1195 (5th Cir. 1993); *see also In re* Oriental Republic Uru., 821 F. Supp. 950, 955–56 (D. Del. 1993) (discussing DEL. CODE ANN. tit. 7, § 6207); *In re* Ballard Shipping Co., 810 F. Supp. 359, 364–66, 368–69 (D.R.I. 1993) (interpreting the Rhode Island Environmental Injury Compensation Act, R.I. GEN. LAWS § 46-12.3-.4 (1991)).

[238] *In re* Exxon Valdez, 270 F.3d 1215, 1251–53 (9th Cir. 2001); Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 767–69 (Alaska 1999).

[239] *See* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994) (finding that the Rhode Island Act is not preempted by the Admiralty Clause); Slaven v. BP Am. Inc., 786 F. Supp. 853, 864–65 (C.D. Cal. 1992) (holding that state law claims that go beyond *Robins* are not preempted); *cf. In re* Nautilus Motor Tanker Co., 900 F. Supp. 697, 702–05 (D.N.J. 1995) (holding that maritime law does not preempt New Jersey's common law, which does not automatically deny recovery for purely economic loss).

[240] *Exxon Valdez*, 270 F.3d at 1251; *Kodiak*, 991 P.2d at 767.

[241] *Exxon Valdez*, 270 F.3d at 1251.

[242] *Id.* at 1252–53 (citing *Kodiak*, 991 P.2d at 769); *Slaven*, 786 F. Supp. at 864–65.

[243] *See Slaven*, 786 F. Supp. at 864.

[244] *Exxon Valdez*, 270 F.3d at 1253.

[245] *See, e.g.*, Sea Hawk Seafoods v. Exxon Corp., 484 F.3d 1098, 1099–100 (9th Cir. 2007) (noting that a claim brought by a seafood processor under Alaska law was settled).

1980s.[246] Only the Exxon Valdez catastrophe and a series of smaller, highly publicized oil spills in subsequent months galvanized public and political support for legislative reform.[247] The Oil Pollution Act[248] was approved by the Senate by a vote of 99–0, and by the House of Representatives by a vote of 360–0, and was signed into law by President George H.W. Bush on August 18, 1990.[249]

The OPA provides that

> each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages ... that result from such incident."[250]

In the case of a vessel, the "responsible party" is the owner, operator, or demise charterer of the vessel.[251]

The responsible party is liable, first, for removal costs incurred by the United States, a state, or an Indian tribe, and by any person who carries out cleanup activities in accordance with the National Contingency Plan.[252] In addition, the OPA enumerates six categories of recoverable "damages," which include loss of subsistence use of natural resources, loss of taxes, royalties, rents, fees or net profit shares (recoverable by the United States or a state), and loss of profits or impairment of earning capacity due to an injury to property or natural resources.[253] While the OPA does not clarify which classes of claimants are covered by the "loss of profits" provision, the conventional view is that it completely supersedes *Robins Dry Dock* and allows recovery for purely

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[246] *See* ENVTL. LAW INST., OIL POLLUTION DESKBOOK 3, 195 (1991); Beth Van Hanswyk, *The 1984 Protocols to the International Convention on Civil Liability for Oil Pollution Damages and the International Fund for Compensation for Oil Pollution Damages: An Option for Needed Reform in United States Law*, 22 INT'L LAW. 319, 338–40 (1988); Sidney A. Wallace & Temple L. Ratcliffe, *Water Pollution Laws: Can They Be Cleaned Up?*, 57 TUL. L. REV. 1343, 1361–62, 1366–67 (1983); Elizabeth R. Millard, Note, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331, 338–40 (1993).

[247] Although a series of smaller spills occurred later in 1989 and 1990, the Exxon Valdez incident was undoubtedly the main catalyst. *See* Harrington, *supra* note 93, at 7–8; Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 482 (2000).

[248] 33 U.S.C. §§ 2701–2762 (2006).

[249] *See* Millard, *supra* note 246, at 368; Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 11–12 n.68 (1990).

[250] 33 U.S.C. § 2702(a) (2006).

[251] *Id.* § 2701(32)(A).

[252] *Id.* §§ 2701(19), 2702(b)(1).

[253] *Id.* § 2702(b)(2).

economic losses resulting from oil spills,[254] presumably subject to a proximate causation requirement.[255]

The OPA generally limits a responsible party's liability. For example, in the case of a discharge from a large double-hull vessel, liability is limited to the greater of $1,900 per gross ton or $16 million.[256] The statutory limits do not apply if the incident was caused by gross negligence or willful misconduct of the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party; or by violation of an applicable federal safety, construction, or operating regulation by any of these parties.[257] The OPA liability cap is further curtailed by the Oil Spill Liability Trust Fund, which consolidated, enhanced, and superseded previously existing oil spill compensation funds.[258] The Fund does not guarantee full compensation to oil spill victims. First, it can pay only up to $1 billion per incident.[259] This amount may be sufficient in the vast majority of cases, but it is clearly inadequate in catastrophic incidents like the recent Deepwater Horizon oil spill. Second, the billion dollar fund may be depleted by payments for harm to natural resources (up to $500 million) and removal costs. This may leave many individual victims with only a forlorn hope of recovery.

Apart from common law remedies, most coastal states have oil pollution legislation with strict—often uncapped—liability provisions.[260] State legislation

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[254] *See In re* Exxon Valdez, 270 F.3d 1215, 1252 (9th Cir. 2001); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630–31 (1st Cir. 1994); Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1014–15 (E.D. La. 1993); Harrington, *supra* note 93, at 8–13; Kiern, *supra* note 247, at 531–32; Rodriguez & Jaffe, *supra* note 249, at 15; Steven R. Swanson, *OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135, 152–55 (2001); Sturla Olsen, Comment, *Recovery for the Lost Use of Water Resources:* M/V Testbank *on the Rocks?*, 67 TUL. L. REV. 271, 286–88 (1992). *But cf. In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 678–79 (E.D. Mich 1992) ("[Section 33 U.S.C. 2702(b)(2)(E)] allows damages only for 'loss of profits . . . due to the injury, destruction, or loss of real property, personal property, or natural resources.' None of the claimants . . . have alleged 'injury, destruction, or loss' to their property.").

[255] *See* Olsen, *supra* note 254, at 287.

[256] 33 U.S.C. § 2704(a)(1).

[257] *Id.* § 2704(c)(1). Additionally, the caps do not apply if the responsible party failed or refused to report the incident, to provide reasonable cooperation and assistance in cleanup efforts, or to comply with orders issued with regard to cleanup. *Id.* § 2704(c)(2).

[258] 26 *id.* § 9509(a).

[259] *Id.* § 9509(c)(2)(A).

[260] *See, e.g.*, ALASKA STAT. ANN. §§ 46.03.822–.824 (West 2011); CAL. GOV'T CODE §§ 8670.3, 8670.56.5 (West 2011); DEL. CODE ANN. tit. 7, §§ 6207–6209 (West 2001); FLA. STAT. §§ 376.12, 376.313 (2010); GA. CODE ANN. § 12-5-51 (West 2006); HAW. REV. STAT. § 128D-6 (2010); LA. REV. STAT. ANN. §§ 30:2004, :2025–:2026 (2011); ME. REV. STAT. ANN. tit. 38, §§ 543, 551–552 (2011); MD. CODE ANN., ENVIR. §§ 4-401 to -410 (West 2010); MASS. ANN. LAWS ch. 21E, § 5 (LexisNexis 2011); N.H. REV. STAT. ANN. §§ 146-A:1–:17 (2010); N.J. STAT. ANN. §§ 58:10–:23.11g (West 2011); N.Y. NAV. LAW § 181 (McKinney 2011); N.C. GEN. STAT. §§ 143-215.83 to -215.94 (2009); OR. REV. STAT. §§ 468B.300–.335 (2007); R.I. GEN. LAWS § 46-12-21 (2011); S.C. CODE ANN. §§ 48-43-

naturally varies with respect to recoverable losses (purely economic losses in particular), liability caps, defenses, etc.[261] The enactment of the OPA rekindled the debate on the interplay between federal and state law. The House of Representatives' bill stated that "except as provided in this Act no action arising out of a discharge of oil . . . may be brought in any court of the United States or of any State";[262] but following staunch opposition of the Senate, environmental groups, the National Association of Attorneys General, and others, an amendment to preserve state power was introduced and ultimately passed.[263] The Senate bill similarly preserved states' authority to impose additional liability.[264] The compromise bill reported by the conference committee unsurprisingly included a non-preemption clause.[265] The OPA thus provided that it should not be interpreted "as preempting[] the authority of any State . . . from imposing any additional liability . . . with respect to the discharge of oil . . . within such State" or as modifying "the obligations or liabilities of any person under . . . State law, including common law."[266] This clause explicitly preserved existing state common law and oil pollution legislation, and allowed subsequent expansion of liability by the states.[267]

One of the main questions that follow is whether purely economic losses in excess of the OPA limit can be recovered under state law. A positive answer may increase polluters' overall liability considerably, especially in cases of catastrophic spills. More importantly, non-preemption may result in an inconsistent array of state legislation, impairing uniformity[268] and making liability depend on the locality of the spill.[269] Admittedly, the OPA has not put an end to the controversy over the possible preemption of state statutes by

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580 to -600 (2008); TEX. NAT. RES. CODE ANN. § 40.202 (West 2011), and TEX. WATER CODE ANN. § 26.265 (West 2011); VA. CODE ANN. § 62.1-44.34:18 (West 2006); WASH. REV. CODE ANN. §§ 90.56.360, 90.56.370 (West 2004); *see also* Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1448 (E.D. Va. 1996) (observing that when OPA was enacted, twenty-four states had oil spill liability legislation, of which seventeen had no liability limits).

261 *See* Harrington, *supra* note 93, at 3, 54, 61–62.

262 H.R. Res. 1465, 101st Cong. § 109(a)(1) (as reported by H. Comm. on Sci., Space, & Tech., Sept. 20, 1989).

263 *See* Millard, *supra* note 246, at 351–54 (discussing the preemption provision).

264 *Id.* at 360–61.

265 *Id.* at 364.

266 33 U.S.C. § 2718(a) (2006).

267 *See* United States v. Locke, 529 U.S. 89, 105 (2000) (holding that § 2718(a) was intended to preserve state laws and powers only with respect to liability and financial requirements). Moreover, the OPA superseded the Limitation of Shipowner Liability Act, 46 U.S.C. §§ 30501–30512 (2006), which could limit liability under state law prior to OPA's enactment. 33 *id.* § 2718; *see also* Kiern, *supra* note 247, at 530. The OPA also provides that it should not affect or be construed to affect "the authority of any State to establish, or to continue in effect, a fund . . . [that pays] for costs or damages arising out of . . . oil pollution." 33 U.S.C. § 2718(b).

268 *See* Harrington, *supra* note 93, at 2, 18–20.

269 *See id.* at 3.

Robins Dry Dock. Some interpret the OPA as allowing the states to extend liability not only beyond the OPA limits, but also beyond general maritime law, including *Robins Dry Dock*.[270] Others believe that state power is still subject to *Jensen*, so there can be no liability for purely economic loss in violation of *Robins Dry Dock*.[271] Some follow the authority of *Knickerbocker Ice Co. v. Stewart*,[272] holding that given the Framers' intent—manifested in the Admiralty Clause of the Constitution—to secure uniformity in maritime law, Congress cannot delegate its legislative power in this area to the states;[273] the OPA's delegation of power, which imperils uniformity, is therefore unconstitutional.[274] In fact, this is not a preemption line of argument at all, because it does not turn on a conflict between federal and state law, but on the unconstitutionality of an act of Congress.

III. THE NEW GUIDEPOST

A. *Building Blocks*

1. *The Constitutional Imperative of Uniformity*

Preemption is a constitutional law doctrine that limits state lawmaking powers in particular areas governed by federal law. While general preemption principles derive from the Supremacy Clause of the Constitution, maritime preemption doctrine derives primarily from a purposive interpretation of the Admiralty Clause. To understand the limits of state lawmaking power in admiralty, we must begin with an in-depth analysis of the purpose of the admiralty grant. In the landmark case of *The Lottawanna*,[275] Justice Bradley deemed one thing unquestionable: "[T]he Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country."[276] The Framers did not intend

> to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.[277]

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[270] *See, e.g.*, *In re* Exxon Valdez, 270 F.3d 1215, 1252 (9th Cir. 2001); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630–31 (1st Cir. 1994).

[271] *See* Swanson, *supra* note 21, at 411–15.

[272] 253 U.S. 149 (1920).

[273] *Id.* at 164.

[274] *See* Harrington, *supra* note 93, at 2–3, 21, 30–52, 71–72.

[275] 88 U.S. (21 Wall.) 558 (1874).

[276] *Id.* at 575.

[277] *Id.*

In other words, the purpose of the Admiralty Clause was to maintain uniformity of maritime law within the United States.[278] To achieve this goal, federal lawmaking powers—judicial and legislative—must be part and parcel of admiralty jurisdiction,[279] and state law must naturally succumb to federal maritime law, at least to some extent.

The traditional interpretation of the Admiralty Clause can be challenged from several angles. Arguably, uniformity of civil maritime law was not the real purpose of the constitutional grant. First, admiralty jurisdiction, just like diversity jurisdiction, could have been intended to secure a neutral forum for litigants rather than uniform substantive law.[280] Second, the Framers might have been concerned with uniformity mainly with regard to public matters—crimes committed on the high seas (such as smuggling and piracy) and taxation—not with regard to private maritime disputes.[281] Moreover, one may argue that general maritime law was not truly "federal" law, and therefore could not properly supersede state law under the Constitution.[282] Finally, one may challenge the view that an abstract interest like uniformity, as opposed to concrete federal interests, can justify preemption of state law.[283] Despite all that, the idea that the Admiralty Clause was intended to secure uniformity, and that the need for uniformity justifies preemption, has remained the conventional view for more than a century.[284]

The desire to reduce diversity among legal systems with respect to commerce is as old as cross-boundary trade.[285] It has numerous manifestations in U.S. legal history, amplifying to some extent its legitimacy as a national objective. To begin with, uniformity can be pursued through the creation of

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[278] *See infra* note 284.

[279] *See supra* Part II.A.2.b.

[280] *See, e.g.*, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 546 n.6 (1995) (opining that admiralty jurisdiction, just like diversity jurisdiction, may have been intended to secure an unbiased forum).

[281] *See* Young, *Preemption at Sea*, *supra* note 13, at 314–16, 326–27.

[282] *See id.* at 317–25, 327.

[283] *See id.* at 343.

[284] *See* Currie, *supra* note 66, at 163, 172 (noting that "[uniformity] is the primary justification for a federal common law of the sea" and that "a uniform law was apparently one reason for the establishment of the admiralty jurisdiction."); Harrington, *supra* note 93, at 2 ("[T]he primary purpose of the constitutional grant of admiralty power to the federal government was to ensure the application of a uniform substantive admiralty law throughout the nation."); Swanson, *supra* note 21, at 380–81, 407 ("Admiralty jurisdiction was given to the federal courts to insure a uniform application of the law .... [The founders] understandably chose to delimit an area of law that would provide uniformity .... [T]he importance of uniformity remains unquestioned."); Haeck, *supra* note 8, at 183, 203 ("The U.S. Constitution and the Judiciary Act of 1789 established federal jurisdiction over maritime torts in order to provide a uniform set of rules for those who wished to conduct maritime commerce .... Admiralty tort jurisdiction was originally established to provide a uniform set of rules ....").

[285] *See* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744 (1999).

federal law, the "Supreme Law of the Land."[286] Indeed, the arguments for preemption are often rooted in an aspiration for national uniformity.[287] The need for uniformity of the law applicable to interstate commerce was recognized, inter alia, within the Commerce Clause jurisprudence.[288] It also motivated the Supreme Court to hold in *Swift v. Tyson* that federal courts hearing cases under diversity jurisdiction should apply federal common law in the absence of a relevant state statute.[289]

But there are also non-compulsory means to pursue uniformity. One method is the design of Model Codes, which aim at state legislatures. Uniform legislation is usually initiated by the National Conference of Commissioners on Uniform State Laws, a non-profit association that seeks "to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable."[290] One of the primary examples of a model code is the Uniform Commercial Code, which is a joint project of the NCCUSL and the American Law Institute.[291] The main problem with this method is that it focuses solely on state legislation. Courts in different states may interpret a similar statutory provision differently, resulting once again in legal variance.[292]

Another method is the Restatement of the Law projects which primarily address state courts. The aspiration underlying these projects is that state courts will treat Restatements as authoritative, reaching uniformity on the judicial level.[293] The main problem is that Restatements generally set forth the law as it

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[286] U.S. CONST. art. VI, cl. 2.

[287] *See* William W. Buzbee, *Introduction to* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 1, 2 (William W. Buzbee ed., 2009).

[288] *See, e.g.*, Richard A. Epstein, NRA v. City of Chicago*: Does the Second Amendment Bind Frank Easterbrook?*, 77 U. CHI. L. REV. 997, 1010 (2010) ("[M]odern Commerce Clause cases . . . trumpet comprehensive uniformity as the goal . . . .").

[289] Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842) (referring to Cicero's call for uniformity as the reason for developing federal common law of commerce).

[290] NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 119TH YEAR, CONST. art 1, § 1.2 (2010), *available at* http://www.nccusl.org/Narrative.aspx?title=Constitution; *see also* Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2134 (1991).

[291] One of the main goals of the U.C.C. is "to make uniform the law among the various jurisdictions." U.C.C. § 1-103(a)(3) (2010).

[292] *See* Grant, *supra* note 92, at 1086–87 (discussing this peril).

[293] *See* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 9 (1924) ("[The Restatements] will be invested with unique authority, not to command, but to persuade. . . . I have great faith in the power of such a restatement to unify our law."); Grant, *supra* note 92, at 1088 ("The great purpose of the Restatements is to persuade courts to reconsider these peculiar local rules . . . in the interest of unity and certainty . . . ." (internal quotation marks omitted)); *see also* Roscoe Pound, *Unification of Law*, 20 A.B.A. J. 695, 696 (1934) ("[Restatement projects are the basis upon which] [a]n economically unified America . . . may well have a unified legal development under the leadership of nationally minded jurists.").

is. Current law is not always warranted, and across-the-board adherence to Restatements may impede necessary modifications and developments.[294]

I mention the main categories of unification projects in the U.S. for two reasons. First, these projects emphasize the importance attributed to uniformity in American legal thought. Second, they demonstrate that voluntary initiatives suffer from inherent weaknesses as compared to forced uniformity through federal lawmaking: model codes do not secure uniformity on the judicial level, and Restatements are too static. Of course, the federal political structure of the United States delimits federal lawmaking powers, thereby making the most effective unification method unsuitable in many cases. Maritime law is one of the special areas of law in which the overarching policy—to the extent that it is justifiable—can be pursued through the most effective method. In fact, according to prevailing views, this is a constitutional imperative.

One caveat needs mention at this point. Even a strict preemption doctrine cannot guarantee absolute uniformity. First, relevant Supreme Court decisions are occasionally susceptible to conflicting interpretations by the lower courts, which undermine whatever uniformity obtained through preemption.[295] Second, most maritime cases are decided by the thirteen circuit courts of appeal and over 630 district courts that may interpret maritime law as they please in the absence of a Supreme Court decision on the specific question at hand.[296] Third, under the "saving to suitors" clause many maritime cases are decided by state courts.[297] Although substantive rights and duties must be determined by maritime law, procedure and to some extent remedies are governed by *lex fori*, and this evidently undercuts uniformity.[298] A state court may also enhance disparity by introducing its own interpretation of the relevant rule, in the absence of a definite ruling of the Supreme Court on the subject.[299]

2. *Uniformity as a Means*

a. *The Underlying Goals*

The second and crucial step in my analysis lies in the understanding that uniformity is not the ultimate end. It is a means for the protection of more fundamental federal interests. The combination of the two assumptions, namely that preemption serves uniformity and that uniformity serves external goals, will inevitably lead to the conclusion that as the underlying justifications for uniformity weaken, so does the need for preemption. What, then, are the

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[294] *See* Grant, *supra* note 92, at 1089.

[295] *See* Peltz, *supra* note 103, at 104–05.

[296] *Id.* at 114–15.

[297] *See supra* note 66 and accompanying text.

[298] Peltz, *supra* note 103, at 116–17.

[299] *Cf. id.* at 115–16 (explaining that state courts have difficulty distinguishing land-based from maritime concepts).

justifications for uniformity? Are they reinforced or supplemented in the maritime context?

In some contexts, uniformity may be associated with aesthetics. The eighteenth-century philosopher Francis Hutcheson opined that "[t]he figures which excite in us the Ideas of Beauty seem to be those in which there is *Uniformity amidst Variety*."[300] Yet it is quite clear that in a commercial context, maritime commerce in particular, "[n]o sense of theoretical beauty of similarity prompts the courts to deny state law."[301] Uniformity legitimately serves only practical goals.

The first objective served by uniformity is legal simplicity. Complexity might impose an undue burden on maritime commerce.[302] Ships, seafarers, and cargo travel from one jurisdiction to another. In the absence of a uniform set of rules, maritime actors must refer to the laws of any jurisdiction potentially involved in planning their conduct.[303] If different laws apply at different points, the cost of ascertaining in advance the law applicable to the activity as a whole rises significantly.[304] Moreover, it is more difficult and more costly to comply with legal standards that vary throughout the journey, especially but not only if these standards concern relatively constant features of the particular activity, such as ship design and construction, ship operating and safety, crew licensing, cargo handling, and the like. Having to simultaneously obey numerous and potentially incompatible local standards may impose "intolerable restrictions" on maritime commerce.[305] In addition, the coexistence of various legal systems with legitimate claims to applicability complicates and therefore raises the costs of litigation and settlement.

The second objective served by uniformity is certainty, hence predictability. As indicated above, ships, seafarers, and cargo constantly travel between various jurisdictions. If the law applicable to a particular activity varies throughout its duration, and fortuities—such as the exact location of a ship at the time of the relevant incident—determine the law, the content of the law is uncertain and legal risks are unpredictable.[306] In a contractual context, legal

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[300] FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE 17 (1726).

[301] Currie, *supra* note 66, at 198.

[302] *See id.*

[303] *See* Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924) ("The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see."); Currie, *supra* note 66, at 160; Swanson, *supra* note 21, at 380 ("[Courts endeavor] to avoid having a hodgepodge of laws apply to a vessel moving from one state to another.").

[304] *See* Swanson, *supra* note 21, at 413 ("Each vessel owner would be required to consider a multiplicity of laws before making any decisions, adding to the cost of doing business in the United States.").

[305] *See W.C. Dawson*, 264 U.S. at 228; *see also* Am. Dredging Co. v. Miller, 510 U.S. 443, 467 (1994) (citing *W.C. Dawson*, 264 U.S. at 228).

[306] *See* Stephan, *supra* note 285, at 746 ("In a world of multiple legal systems and uncertainty about where things will go wrong, the parties must worry about divergent rules

risks may be priced into the contract, and if they are unpredictable transaction costs are necessarily higher. At a certain point people may even avoid otherwise profitable transactions due to this indeterminacy.[307] If the applicable law is unexpected, contractual allocation of risk may be jeopardized. In torts, certainty about the legal risks enables potential injurers and victims to better prepare for contingencies, either by modifying their conduct or through some sort of insurance.[308] Finally, uniformity in a particular field prevents uncertainty related to choice-of-law disputes, at least to the extent that the boundaries of the field are certain.[309]

The third objective served by uniformity is fairness, namely treating similar situations equally.[310] Again, a typical maritime activity is not confined to a single jurisdiction. In the absence of uniformity, the legal outcome of specific conduct may turn on the fortuitous location of parties or objects at the time of the legally relevant incident. This seems arbitrary. For instance, if a seaman was injured due to the unseaworthiness of the vessel en route from New York to Florida, the exact location of the ship at the time of the injury does not seem like a reasonable determinant of the legal outcome. Similarly, if the same incident occurred on two vessels transporting people or goods between ports A and B, it seems unfair to apply different sets of rules to each incident just because one occurred at port A and the other at port B.

Do these factors merit special consideration in the maritime context? The answer must be in the affirmative. The advantages of a uniform legal regime are more apparent and acute where the likelihood of cross-border activities is high. Local activities do not normally generate competing claims to applicability. But maritime activities, especially commercial ventures, are more often than not interstate or international. So uniformity seems highly pertinent.

b. *The International Dimension*

As indicated in the introduction, the United States is a maritime nation, with only two international land borders, and thousands of miles of coastline along

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applying to their disputes."); Haeck, *supra* note 8, at 199–200, 206 ("[Uniformity aims] to create a system where shipowners could predict the consequences of their actions.").

[307] *See* Stephan, *supra* note 285, at 746.

[308] *See* Currie, *supra* note 66, at 160 ("[P]ersons would be enabled to plan their conduct and their expenses simply and without the discomfort of necessary reference to the laws of every jurisdiction that might be involved . . . ."); Haeck, *supra* note 8, at 199 ("The uniformity of maritime tort law continues to be instrumental in ensuring that vessel operators can predict the consequences of their conduct through adherence to uniform rules of conduct . . . .").

[309] *See* Currie, *supra* note 66, at 160.

[310] *Cf.* Willem H. van Boom, *European Tort Law: An Integrated or Compartmentalized Approach?*, *in* EUROPEAN PRIVATE LAW BEYOND THE COMMON FRAME OF REFERENCE: ESSAYS IN HONOUR OF REINHARD ZIMMERMANN 133, 134 (Antoni Vaquer ed., 2008) ("[T]he proponents of harmonization of tort law [in Europe] argue that [this] would serve goals of equal treatment of wrongs and rights and equal protection of, e.g., business interests . . . .").

two oceans.[311] Maritime ventures have always played a central role in maintaining and enhancing national security and economic well-being. Recall that in 2008 maritime transportation accounted for 78% of U.S. international trade by volume and approximately 48% by value.[312] American maritime law must be responsive to the needs and expectations of U.S. trade partners, at least to the extent that ignoring them may impinge on U.S. vital interests.

For starters, maritime activities that affect the American economy are carried out in large part by foreign entities. So while uniformity of maritime law is undoubtedly important for American maritime players, it is even more important for foreign players. U.S. foreign trade partners need to encounter a simple and certain legal regime when conducting their business in U.S. waters or in cooperation with U.S. maritime actors.[313] If U.S. maritime law lacks uniformity, foreign players have to consider and adapt to a multiplicity of potentially applicable laws.[314] This increases the cost of doing business with the United States and may result in higher prices for American consumers, lower profits for American producers, and other business disruptions.[315] In extreme cases, foreign players may choose to avoid the United States altogether.[316] Simply put, variance within U.S. maritime law may discourage international commerce and collaboration. Given the importance of international maritime activities to the U.S. economy, the detrimental effect is evident.

Moreover, the global nature of maritime activities has motivated the evolution of transnational maritime law from days of yore. The Roman statesman Cicero observed that in his day maritime law was not the law of a single country but rather transnational: "*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit.*"[317] The origins of modern maritime law date back to the Laws of Oléron, a comprehensive set of rules promulgated in the twelfth century by Eleanor of Acquitaine or (less likely) her son, King Richard I.[318] The rules covered hiring of ships, delivering cargo, selling and hypothecating ships and cargo, contributions in general average, liability for collisions between ships, duties of pilots, and other topics.[319] Soon after their enactment they

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[311] *See supra* note 5 and accompanying text.

[312] *See supra* note 8.

[313] *See* Haeck, *supra* note 8, at 181, 199 ("[F]oreign commerce interests need to be able to act with a degree of certainty when shipping goods to and from the United States.").

[314] *See* Swanson, *supra* note 21, at 413.

[315] *See id.* at 380–81 ("Without a unifying national system, each state could have adopted different maritime rules, causing an adverse effect on both internal and external commerce.").

[316] *See id.* at 413.

[317] *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (citing Cicero with respect to the law of negotiable instruments) ("There is not a law of Rome, another of Athens, another now and another later, but among the nations, at all times, there is one law.").

[318] *See* Charles S. Haight, *Babel Afloat: Some Reflections on Uniformity in Maritime Law*, 28 J. MAR. L. & COM. 189, 191–94 (1997); Paulsen, *supra* note 68, at 1070.

[319] *See* Haight, *supra* note 318, at 191.

became the benchmark for maritime regulations in all of Northern Europe,[320] including the maritime laws of England.[321] So historically, general maritime law was one of the three main branches of the law of nations, a "body of rules and customs developed and refined by a variety of nations" over hundreds of years.[322] In *American Insurance Co. v. 356 Bales of Cotton*,[323] Justice Marshall admitted that "[a] case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise."[324]

The underlying rationale for this development is still evident, as illustrated by the Supreme Court of Canada decision in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*[325] In his well-crafted dissent, Justice La Forest endeavored to justify the rule of no recovery for purely economic loss. In a concluding comment, he noted that

> [t]his case is one of maritime law, which in large measure encompasses a global system. The bright line exclusionary rule against recovery has for nearly a century been in effect in that system, and continues to be followed by the major trading nations, in particular Great Britain and the United States.[326]

Those engaged in maritime commerce must, in his opinion, "be governed by a uniform rule, so that they can plan their affairs ahead of time, whether by contract or insurance against possible contingencies."[327] In other words, uniformity on the international level facilitates international maritime activities, for the same reasons that uniformity on the interstate level facilitates interstate activities. U.S. trade partners legitimately expect some uniformity on the transnational level.

In addition to uniformity on the judicial level, maritime nations have endeavored to advance uniformity through international conventions. For instance, in the early twentieth century the Comité Maritime International was responsible for initiatives for international unification of the law concerning

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[320] *See* Paulsen, *supra* note 68, at 1070–72.

[321] *See* JAMES REDDIE, AN HISTORICAL VIEW OF THE LAW OF MARITIME COMMERCE 417–19 (Edinburg & London, William Blackwood & Sons 1841).

[322] Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279–81 (1996).

[323] 26 U.S. (1 Pet.) 511 (1828).

[324] *Id.* at 545–46.

[325] [1992] 1 S.C.R. 1021, para. 332 (Can.) (La Forest, J., dissenting).

[326] *Id.*

[327] *Id.*

salvage, collisions at sea, and limitation of shipowners' liability.[328] The United States assumed a significant role in international negotiations of this sort.[329]

The United States is by and large committed to international uniformity of maritime law for practical and political reasons. From a practical perspective, international uniformity may facilitate maritime activities in the same manner as national uniformity but with greater vigor, due to the significant contribution of foreigners to maritime ventures in America, unequalled in land-based activities.[330] Thus, promoting uniformity is beneficial to the U.S. economy. International uniformity can also save the costs of choice-of-law disputes where citizens of different countries are involved.[331] From a political perspective, the United States may pay a price in the diplomatic arena if it opts out of international schemes, excluding itself from the family of nations. The Supreme Court observed in *American Dredging Co. v. Miller*[332] that "[a]t the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce."[333] Comity with other nations is still important today. Similarly, because many foreigners participate in maritime activities under U.S. jurisdiction, adherence to an international—seemingly unbiased—scheme may prevent tensions where entities from two or more countries are involved in a particular incident.[334]

Now U.S. law cannot be consistent with uniform transnational standards if it is internally varied. Domestic uniformity is a precondition for international uniformity.[335] In the words of Justice Hughes: "For maritime law the modern relevancy of the single national voice in international affairs is that, when America adheres to a law that is uniform among several nations, that law must necessarily be uniform within this country."[336] This simple syllogism adds to the other justifications for uniformity.

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[328] *See* Lord Justice Kennedy, *The Unification of Law*, 10 J. SOC'Y COMP. LEGIS. 212, 217 (1910).

[329] *See, e.g.*, Burrell, *supra* note 83, at 56–57 (discussing the role of the Maritime Law Association of the United States).

[330] *See* Currie, *supra* note 66, at 163–64.

[331] *See* Paulsen, *supra* note 68, at 1066.

[332] 510 U.S. 443 (1994).

[333] *Id.* at 466.

[334] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 531, 533 (1833) ("[T]his class of cases has . . . an intimate relation to the rights and duties of foreigners . . . . It may materially affect our intercourse with foreign states . . . . [A]dmiralty jurisdiction naturally connects itself . . . with our diplomatic relations and duties to foreign nations . . . .").

[335] *See, e.g.*, Ray v. Atl. Richfield Co., 435 U.S. 151, 168 (1977) ("A state law in this area . . . would frustrate the congressional desire of achieving uniform, international standards . . . .").

[336] Hughes, *supra* note 6, at 5.

B. *The Main Argument*

1. *The Capacity to Pre-Select Applicable Law*

a. *Prologue*

Many attempts have been made to identify a uniform theme to maritime preemption cases or to propose such a theme.[337] I noted above that a renowned scholar found that "the Court's opinions [on maritime preemption from *Jensen* to *Yamaha*] do not give intelligible reasons, just conclusions," and that even if we attempted to discern useful patterns by viewing the aggregate results, "this body of jurisprudence discloses few useful patterns."[338] But I also showed that several distinctions have emerged from the case law that may be quite telling in a case-by-case preemption analysis. This section puts forward and defends a new guidepost that is both theoretically sound and doctrinally tenable.

I contend that an inverse relation should exist between the preemptive force of federal maritime law in a particular type of case and litigants' capacity to pre-select the law applicable to their situation. Simply put, if the parties could easily select applicable law before the occurrence of the legally relevant incident, preemption of state law should be avoided, whereas if pre-selection was unfeasible or too costly, preemption might be justified. Although this argument needs to be defended and qualified before being implemented, two fictional examples may be helpful at this stage. Consider first a breach of a maritime contract for the carriage of goods from one state to another. According to my thesis, federal maritime law should not preempt relevant state law, because the parties could easily incorporate a choice-of-law provision into their contract. Now consider a collision between two ships in U.S. territorial waters. In this case, the parties could not negotiate a choice-of-law provision, because they did not have any interaction prior to the accident. So preemption of state law may be appropriate.

b. *Theoretical Defense*

The theoretical defense of my thesis has two components. The first rests on the understanding, developed in the preceding section, that preemption is intended to serve uniformity and that uniformity is not an end in itself, but a means. Presumably, as the risks associated with lack of uniformity diminish, uniformity may be tempered. Let us recall why uniformity is generally warranted. First, it provides simplicity.[339] Without it, maritime actors must refer

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[337] *See, e.g.*, Robertson, *Displacement of State Law*, *supra* note 66, at 357–68 (proposing a preemption model).

[338] Robertson, *Applicability of State Law*, *supra* note 66, at 90; *see also id.* at 95–96 (showing that any attempt to synthesize this body of jurisprudence is untenable).

[339] *See supra* notes 302–05 and accompanying text.

to the laws of any jurisdiction potentially involved. Ascertaining and complying with legal rules becomes more difficult and costly if applicable law varies. In addition, the coexistence of various legal systems with legitimate claims to applicability raises the costs of litigation and settlement. Second, uniformity provides certainty.[340] In its absence, fortuities may determine the content of applicable law, making preparation for contingencies more burdensome and costly ex ante, and triggering choice-of-law disputes ex post. Third, uniformity generates fair outcomes, because the legal outcome of a specific conduct does not hinge on the fortuitous location of parties or objects at the time of the legally relevant incident.[341] Equal events are treated equally.

If the parties can pre-select applicable law, the above goals can be achieved without uniformity, hence, without preemption of state law. If the parties indeed pre-select applicable law only a single legal system remains relevant, so there is no difficulty in mapping relevant law in advance and no particular complexity in compliance. This simplicity persists after the occurrence of legally relevant incidents, keeping the costs of litigation and settlement similar to those incurred under a strict preemption regime. Moreover, a choice-of-law provision removes any fortuity in the determination of applicable law and any related uncertainty before and after the occurrence of legally relevant incidents. Of course, uncertainties associated with the internal substance of the applicable law remain. But pre-selection might ultimately generate more certainty than a strict preemption doctrine, because commercial entities will presumably opt for the least uncertain system of law, whereas the law governing an interaction under a strict preemption doctrine cannot always claim this title. Finally, to the extent that the determinative law has been pre-selected by the parties themselves, no claim of unfairness can arise. In a particular case, the legal outcome does not hinge on the chance location of parties or objects at the time of the legally relevant incident. The parties' preliminary consent trumps any possible complaint about the disparities between the legal outcomes of two similar cases.[342] On top of that, assuming that maritime players will generally prefer the same systems, owing to their internal certainty and simplicity,[343] the outcomes of similar cases will probably be similar anyway.

The second component of my defense lies in the inherent advantages of private choice of law. Under a strict preemption regime, a single system governs the subject matter. While uniformity has its benefits, it also has a relative deficiency: it curtails regulatory competition. In the absence of a

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[340] *See supra* notes 306–09 and accompanying text.

[341] *See supra* note 310 and accompanying text.

[342] *See* Horacio Spector, *A Contractarian Approach to Unconscionability*, 81 CHI.-KENT L. REV. 95, 99 (2006) ("[E]xcept under special conditions, informed and free consent cleanses transactional unfairness.").

[343] Similarly, competition among states for the most desirable corporate code has led most publicly-traded corporations in the United States to incorporate under Delaware law. *See Department of State: Division of Corporations*, STATE OF DEL. (JAN. 19, 2011, 8:17 AM), http://www.corp.delaware.gov/aboutagency.shtml.

unification mechanism, and if private selection of applicable law is permitted, various legal systems can compete over the terms offered to commercial actors.[344] Every state can offer a different regulatory scheme, and businesses can choose the system that is most suitable for their needs and preferences via choice-of-law agreements. As in any other market, free competition improves the products, as long as there are no market failures. In the legal context, competition can be expected to generate simpler, fairer, more certain, and more efficient sets of rules, and thereby facilitate human action and interaction. States have an incentive to endorse and devise better rules, because those that fall behind may lose various sources of economic gain. People may move their businesses to friendlier legal environments. Also, insofar as choice of law is linked to jurisdiction clauses, offering better laws may encourage more legal and related financial activities within the state. American legal history demonstrates the importance of this type of competition. For instance, in the United States the law of the state of incorporation, a voluntary contractual choice, applies to most issues of corporate governance. Thus, the states have competed over the terms of corporate governance. Not surprisingly, "corporate managers decide where to incorporate largely on the basis of which jurisdiction's laws are most likely to maximize the firm's value."[345]

Apart from the gradual refinement of the law through competition, non-preemption allows small-scale legal experiments. While it is possible to speculate on the consequences of legal change, often with a high degree of accuracy, the real consequences become evident only in retrospect. Assume that a particular legal change is contemplated. In a uniform system, the change will immediately affect the entire nation, for better or for worse. In the absence of uniformity-driven preemption, state systems may serve as test labs for legal reform.[346] If the experiment proves successful, other states can adapt to the findings. If the experiment fails, the harm is experienced in a specific jurisdiction, not across the nation.

c. *Doctrinal Defense*

So far, I have contended that pre-selection of applicable law by the parties is generally preferable to uniformity achieved through preemption of state law. The inevitable conclusion is that if the parties could easily select applicable law before the occurrence of the legally relevant incident, preemption of state law should be avoided, and vice versa. Now we need to determine whether this guidepost is doctrinally tenable. To do so, we have to answer two questions. First, is pre-selection legally possible? Second, can the capacity to pre-select

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[344] *See* Stephan, *supra* note 285, at 788; van Boom, *supra* note 310, at 135.

[345] Stephan, *supra* note 285, at 791.

[346] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

applicable law be taken into account in a preemption analysis within the constitutional framework?

The doctrinal feasibility of my thesis requires legal validation of choice-of-law provisions. American courts have long recognized contracting parties' power to select the law applicable to their transaction.[347] This principle is manifested in the Restatement (Second) of Conflict of Laws[348] and various sections of the Uniform Commercial Code[349] and has been followed by most state courts.[350] This view was also implicitly endorsed by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*[351] In that case, a towing contract provided that any dispute arising from its performance would be adjudicated in England.[352] The Court held that forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[353] The importance of this decision for our purposes derives from the fact that the choice-of-forum provision was upheld even though "English courts would enforce the clauses of the towage contract purporting to exculpate [the towing company] from liability for damages to the [towed barge]."[354] Put differently, the choice-of-forum provision also implied a choice of law, and the two were given effect together.[355]

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[347] *See, e.g.*, William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 711–15 (2001) (discussing the history of the American position on this matter); Richard J. Bauerfeld, Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1659–60 (1982) (explaining that courts follow choice-of-law clauses); *cf.* D. St. L. Kelly, *International Contracts and Party Autonomy*, 19 INT'L & COMP. L.Q. 701, 701 (1970) (explaining that choice-of-law provisions are generally recognized in England).

[348] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). The Restatement itself does not directly apply to federal–state conflicts. *Id.* § 2 cmt. c.

[349] U.C.C. §§ 1-301(c), 4A-507(b), 5-116(a), 8-110(d) (2010).

[350] *See* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 n.96 (1997).

[351] 407 U.S. 1 (1972).

[352] *Id.* at 2.

[353] *Id.* at 10; *see also id.* at 12, 15.

[354] *Id.* at 15.

[355] *See id.*; *see also* Bominflot, Inc. v. The M/V Henrich S, 465 F.3d 144, 148 (4th Cir. 2006) (enforcing a contractual choice-of-law clause in a maritime context); Hawkspere Shipping Co. v. Intamex, S.A., 330 F.3d 225, 233 (4th Cir. 2003) (same); Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287, 1296–98 (9th Cir. 1997) (same); Stoot v. Fluor Drilling Servs., Inc., 851 F.2d 1514, 1517 (5th Cir. 1988) (same); Zepsa Indus., Inc. v. Kimble, No. 3:08cv4-RJC, 2008 U.S. Dist. LEXIS 94602, at *5–7 (W.D.N.C. Nov. 11, 2008) (same). *But cf.* Jason R. Harris, *Opting Out of Admiralty Law?: Uniformity vs. Freedom of Contract in the Selection of State Choice of Law*, 34 TUL. MAR. L.J. 167, 168, 170, 173 (2009) (contending that choice-of-law clauses should not be enforceable to the exclusion of applicable maritime law, because uniformity in maritime law must be maintained).

While pre-selection of applicable law is usually explicit, the court can deduce from the provisions of the contract that the parties wished the law of a particular state to apply even in the absence of an express reference.[356] Still, the power to pre-select applicable law is not unlimited. In the United States, it is subject to at least two constraints. First, like any other contractual provision, choice-of-law provisions are not enforced if one of the parties' consent was obtained by mistake or by improper means, such as fraud, misrepresentation, or duress.[357] Second, the selected law will not be applied if its application frustrates a fundamental policy of the state whose law would apply in the absence of the choice-of-law provision (the default).[358] The courts should not refrain from applying selected law merely because it yields a different result from the default; the difference must frustrate a policy that is so substantial that it can "justify overriding the concerns for certainty and predictability underlying modern commercial law."[359] For example, a choice-of-law provision may not be given effect if it circumvents relevant rules designed to protect weaker parties in cases of unbalanced bargaining power, or rules that render the contract illegal.[360] These qualifications will be further discussed below.

Lastly, we need to determine whether conceding uniformity where pre-selection is possible conforms to the constitutional framework. Admittedly, the purpose of the Admiralty Clause was to maintain uniformity of maritime law within the United States.[361] But this does not mean that courts will strike down choice-of-law provisions in maritime contexts for jeopardizing uniformity. We now know that uniformity is not an end in itself, so the Framers could not have intended to promote uniformity for its own sake. They probably had practical concerns in mind. As explained above, the underlying goals can be achieved without uniformity where the parties can pre-select applicable law. Limiting state power through preemption in the absence of a compelling federal interest in doing so could not have been intended by the Framers. Implementing my thesis entails, therefore, a refined interpretation of the Admiralty Clause. But no radical step is required. After all, even *Jensen* and its progeny do not dictate absolute uniformity, but "proper harmony and uniformity" in light of the underlying goals.[362]

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[356] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 187 cmt. a (1971).

[357] *See id.* § 187 cmt. b.

[358] *See id.* § 187(2)(b) & cmt. g; U.C.C. § 1-301(f) (2010); *see also* Kelly, *supra* note 347, at 701 (showing that the power to select applicable law is also subject to public policy under English law).

[359] Woodward, *supra* note 347, at 735 (discussing the Reporter's notes to U.C.C. § 1-301(f)).

[360] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g.

[361] *See supra* note 284.

[362] S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917); *see also supra* Part II.B.2.

2. *The Contract–Tort Divide*

a. *A Judicial Heuristic*

Academic literature seems to recognize an important distinction between contracts and torts in unification and harmonization projects, including uniformity-driven preemption. Yet the conventional view is that uniformity is more vital in the realm of contracts. The late Professor David Currie, a distinguished expert in constitutional law and conflict of laws, opined more than fifty years ago that it is "of the utmost importance that the contractual rights of persons engaged in maritime commerce be safeguarded from unwarranted impairment by the diverse laws of the states."[363] Put differently, "[t]he advantages of a uniform law are particularly great in contract, since contracts are the core of planning for the conduct of business."[364] In his view, tort liability is a relatively small concern for maritime businesses, due to its rarity, so "uniformity is less important in tort than in contract."[365] Interestingly, a similar justification for a distinction between contracts and torts is found in recent literature on harmonization efforts in the European Union. According to one author, "harmonization efforts concerning contract law have made more sense than those concerning tort law."[366] While variance of contract law may be an obstacle to commerce within the EU, tort law plays a relatively minor role in the decision making of businesses and consumers, so the differences in tort law are unlikely "[to] distort any economic level playing field."[367] The relative unimportance of tort law derives, in his opinion, from the fact that "[w]e tend not to commit torts every day, but we definitely do enter into contracts every day."[368]

My thesis supports a distinction between contracts and torts in preemption analysis, but it actually mandates the exact opposite result from that advocated by Currie. At this stage, the explanation seems almost trivial. I contended that if the parties could easily select applicable law before the occurrence of the legally relevant incident, preemption of state law should be avoided, whereas if pre-selection was unfeasible or too costly, preemption might be justified. In a paradigmatic contractual setting, the parties can incorporate a choice-of-law provision into the contract. There is simply no need for uniformity. In a paradigmatic tort case, on the other hand, the parties may have been complete

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363 Currie, *supra* note 66, at 189.

364 *Id.* at 210.

365 *Id.* at 189. Although this is probably one of Currie's first publications, it is deemed quite important. It was included in FEDERALISM: A NATION OF STATES—MAJOR HISTORICAL INTERPRETATIONS (Kermit L. Hall ed., 1987). The paragraph explaining why uniformity is more important in contracts was cited in Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part II)*, 28 J. MAR. L. & COM. 555, 562 n.307 (1997).

366 van Boom, *supra* note 310, at 135.

367 *Id.*

368 *Id.* at 136.

strangers prior to the accident. Private choice of law is less likely, and the need for uniformity arises. So if my thesis is valid, the case for preemption should be generally stronger with respect to maritime torts, not with respect to maritime contracts. This conclusion can serve as a judicial heuristic in maritime preemption analysis and possibly as a general guideline in all types of unification projects around the world.

The contract-tort divide is based on the understanding that uniformity is not equally important in the two fields. I contend that it is more vital in torts, where the parties cannot pre-select applicable law. Additionally, the main justification for the opposite view, namely the relative rarity of torts in maritime operations, cannot stand. It is erroneous to deduce the relative significance of tort law from a comparison of the frequency at which maritime actors commit torts and the frequency at which they enter into contracts. The proper comparison is either between the frequencies of being subject to tort duties and entering into contract or between the frequencies of committing torts and breaching contracts. Tort law is omnipresent. Maritime actors are subject to a myriad of tort law duties at every moment and with regard to any act. Therefore, it cannot be assumed that contractual obligations have a significantly stronger impact on maritime ventures than tort law duties. Nor is there any reason to suppose that the tendency to breach contracts is systematically and significantly different from the tendency to commit torts.

b. *Possible Qualifications*

I argued that if my thesis is valid, the case for preemption in a tort setting should be generally stronger than in a contractual setting. But this judicial heuristic should be employed with caution in view of its theoretical foundations. This section aims to identify the limits of the rough distinction between contracts and torts in maritime preemption analysis. It first examines whether preemption may be justified in contractual contexts in which pre-selection is invalidated, then discusses the possibility of pre-selection in certain types of tort settings, and finally outlines other possible justifications for avoiding preemption in specific types of tort cases.

Arguably, the existence of a contract should not always rule out preemption, because the parties' capacity to pre-select applicable law is not unlimited. As indicated above, this power has two fundamental constraints. First, choice-of-law provisions are not enforced if one of the parties' consent was obtained by mistake or by improper means.[369] Second, the selected law cannot be applied if its application frustrates a fundamental policy of the state

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[369] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971); *cf.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.").

whose law would apply in the absence of the choice-of-law provision.[370] In principle, where pre-selection is impossible or impractical, uniformity is required, and uniformity-oriented preemption is justified. But where courts do not give effect to choice-of-law provisions in cases of violation of public policy, it is inaccurate to say that pre-selection was impossible or impractical. It was possible, but not done properly. My theoretical argument is that uniformity is unnecessary where the parties could pre-select applicable law, not only where the parties actually incorporated an enforceable choice-of-law provision into their contract. Where the parties can easily avoid complexity, uncertainty, and unfairness, we should not use the heaviest constitutional weaponry, namely preemption of state power, to achieve the same goals. The rationale for non-preemption is still valid if the parties in a particular case failed to pre-select applicable law or selected improperly, because the legal framework for negotiating choice-of-law provisions was well-established and drafting an enforceable provision was possible. The parties are expected to negotiate choice-of-law provisions properly, just as they are with regard to any other term. They cannot complain about the foreseeable consequences of non-compliance with universal principles of contract law.

A unique policy concern arises in the case of extremely unbalanced bargaining power, where the stronger party can dictate the applicable law. Enforcement of choice-of-law provisions in such cases may have an unwarranted effect. Strong parties may systematically prefer the law that affords the weakest protection for their counterparts' interests. Moreover, in an attempt to attract large businesses, states may compete in creating friendlier and less burdensome legal regimes for strong entities at the expense of weaker parties.[371] Should this affect preemption analysis? Courts can protect the interests of vulnerable parties by not giving effect to choice-of-law provisions in clear cases of power abuse. Of course, a court will not strike out a choice-of-law clause merely because bargaining powers were unequal. It will examine whether the specific clause is patently unfair.[372] A choice-of-law clause can be deemed unfair only if the selected law significantly jeopardizes fundamental interests of vulnerable parties and if these parties did not have a real choice because they could not give up the product or the service and could not obtain better

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[370] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) & cmt. g (1971); U.C.C. § 1-301(f) (2010).

[371] *See* Stephan, *supra* note 285, at 795 ("Jurisdiction might compete for businesses not by offering them legal rules that generally add value, but rather by tolerating arrangements that generate negative externalities . . . . Predators will force those with whom they contract to accept national legal regimes that contain malignant rules.").

[372] *Cf.* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1992) ("It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.").

protection at a higher price.[373] This leaves a lot of leeway for legitimate pre-selection, making compelled uniformity redundant. Powerful business entities have an incentive to pre-select applicable law even if the selected law is less biased, because simplicity and certainty have a significant economic value. Policy-based constraints on pre-selection will only prevent them from dictating one-sided law. Judicial scrutiny of choice-of-law provisions might also curtail a regulatory "race-to-the-bottom" among the several states.[374]

The interim conclusion is that the contract–tort divide in preemption analysis does not have notable exceptions on the contract side. On the other hand, there are various types of tort settings in which the parties' interaction began before the accident and pre-selection of applicable law was not impossible or impractical. These types of cases call for qualification of the judicial heuristic. Under the theoretical analysis, uniformity-oriented preemption is not warranted where pre-selection is feasible, irrespective of the concrete formulation of the particular claim. For example, vessel owners and cargo owners can pre-select the law applicable to torts occurring during the voyage; cruise lines and passengers can pre-select the law applicable to injuries occurring during the cruise; and so on.

Of course, the capacity to pre-select the law applicable to tort disputes is limited in the same manner outlined above. For example, provisions in contracts between vessel owners and passengers purporting to relieve the owners from or limit their liability for negligent infliction of death or personal injury are void, being contrary to public policy.[375] Any provision purporting to weaken passengers' right to trial by a competent court is also deemed unlawful.[376] Therefore, a choice-of-law provision that refers the parties to a legal system that denies liability for negligent infliction of death or physical injury must be invalid.

An interesting question arises with regard to unilateral pre-selection of law in tort settings. I explained that in certain types of tort settings the parties' interaction begins before the harmful event, and consensual pre-selection is possible. But even in the absence of prior interaction, pre-selection of applicable law is often possible, though not warranted. Assuming that in the absence of preemption applicable law depends on location, a shipowner may set the ship's route in accordance with the legal outcomes of various types of conduct or harm at each and every point. The owner may, for example, decide not to travel through the territorial waters of states with relatively expansive liability regimes.[377] In paradigmatic contractual settings, both parties' consent is

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[373] *Cf. Carnival Cruise*, 499 U.S. at 593–95 (upholding a forum-selection clause in a standard form contract between a large shipping company and its passengers because no fundamental interest was infringed and the passengers could reject the contract).

[374] Political pressures exerted by consumers on lawmakers, and consumers' willingness to pay more for better protection may also restrain a regulatory "race-to-the-bottom."

[375] 46 U.S.C. § 30509(a)(1)(A) (2006).

[376] *Id.* § 30509(a)(1)(B).

[377] *See* Swanson, *supra* note 21, at 410, 415.

required for an a priori choice of law, so competition between jurisdictions is sensitive to the interests of both parties and may gradually generate simpler, fairer, more certain, and more efficient sets of rules. On the other hand, competition in the realm of torts, with the intent to accommodate the preferences of unilateral law selectors, may gradually increase tolerance to negative externalities.[378] This should be avoided. However, while contractual choice-of-law provisions are subject to judicial scrutiny, unilateral selection is not. So a different means must be employed to prevent strategic selection that runs counter to public policy. This can be done by making unilateral selection ineffective, namely through forced uniformity. To conclude, the likelihood of unilateral selection should not qualify the contract–tort divide in preemption analysis.

A different qualification derives from the understanding that state law should not be preempted where uniformity is unnecessary. While the possibility of pre-selection of applicable law is a good example of such a case, it is not the only manifestation. For instance, uniformity is generally intended to facilitate and advance maritime commerce, so it is arguably less needed where upholding state law does not disrupt maritime commerce, as in the case of local wrongful death legislation applied to purely local incidents.[379] If we add states' strong and recognized interest in protecting life and limb within their borders, the case for preemption of state law concerning wrongful death during the performance of a local activity weakens even more.[380]

C. *Implementation*

1. *Level of Abstraction*

The theoretical framework proposed above must be used on a relatively general topic-based level. Preemption analysis cannot be performed on a case-by-case basis because it is a legal rather than a factual inquiry. However, the contract-tort distinction seems too general to be determinative. First, as we have already seen, the theoretical argument does not support an unqualified distinction between contractual and tort settings for the purpose of preemption analysis. Fragmentation of tort law may conform to my thesis. Second, and more importantly, the proposed guidepost is intended not to replace but to supplement traditional guidelines and distinctions. It ought to be used in conjunction with other relevant distinctions that do not overlap the contract-tort divide. For example, if a matter is sufficiently local, uniformity-oriented

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[378] *See* Stephan, *supra* note 285, at 795; *see also* Scott R. Saleska & Kirsten H. Engel, *"Facts Are Stubborn Things": An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55, 61–74 (1998) (discussing the "race-to-the-bottom" in the environmental context).

[379] *See* Currie, *supra* note 66, at 188.

[380] *See id.*

preemption may be inappropriate[381] even if the parties could not pre-select applicable law. Third, preemption analysis must be sensitive to federal policies underlying specific maritime law rules, not only to the overarching need for uniformity. Fourth, it is important to consider the purpose of the relevant state law and discern the degree of its interference with uniformity in order to properly balance federal and state interests.[382] Nonetheless, given the centrality of the contract-tort divide in implementing the proposed guidepost, I will use it to systematically illustrate the possible utilization of my thesis.

2. *Contracts*

Maritime contract law covers various types of contracts, such as charter parties, bills of lading, salvage contracts, towage contracts, repair contracts, marine insurance, and maritime employment contracts.[383] In a contractual context, pre-selection of applicable law is generally feasible,[384] so uniformity is not necessary and uniformity-oriented preemption is not justified. To explain further the practical implications of this idea I will now discuss two Supreme Court decisions in which the outcome clearly conforms to my thesis, and two other cases in which the outcome seems inconsistent with the proposed guidepost. *Red Cross Line v. Atlantic Fruit Co.*[385] involved a charter-party that included a provision whereby any dispute between the owners and the charterers would be referred to arbitration.[386] Federal courts had previously found agreements to arbitrate disputes valid but unenforceable by specific performance.[387] On the other hand, under the Arbitration Law of New York an agreement to settle a controversy by arbitration was valid and enforceable.[388] The Supreme Court held that although the "saving to suitors" clause did not encompass "attempted changes by the States in the substantive admiralty law," it included "all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved."[389] Therefore, New York could empower its courts to compel specific performance of an agreement for arbitration.[390] This outcome is reinforced by the new guidepost, given the contractual setting. The owner and the charterer incorporate a choice-of-law provision into the charter-party, which is already a very sophisticated

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[381] *See supra* notes 205–11 and accompanying text.

[382] *See* Currie, *supra* note 66, at 206.

[383] *See* SCHOENBAUM, *supra* note 20, at 107, 137–38, 196–98, 485, 536–38, 676, 725–26, 846–47 (discussing various types of maritime contracts).

[384] *See, e.g.*, *id.* at 546 ("Many bills of lading stipulate . . . applicable law."); Harris, *supra* note 355, at 167 ("Maritime contracts . . . often contain a choice of law clause.").

[385] 264 U.S. 109 (1924).

[386] *Id.* at 109.

[387] *Id.* at 120–23.

[388] *Id.* at 118–20.

[389] *Id.* at 123–24.

[390] *Id.* at 124.

contract. Under those circumstances, there is no need for uniformity, and no reason to preempt state law. If the parties in *Red Cross Line* wanted to disable specific performance of the agreement to arbitrate, they could have simply provided that federal maritime law would apply exclusively to their transaction.

In *Wilburn Boat Co. v. Firemen's Fund Insurance Co.*,[391] the legal question was whether a causal connection between breach of an insurance policy warranty and the insured's loss was necessary to deny recovery under the policy.[392] Texas law required a causal link between the breach and the damage,[393] whereas a pre-*Erie* Supreme Court decision applying "general commercial law" barred recovery whenever the insured was in breach of warranty.[394] The Court held that there was no rule of maritime law on breach of warranty and that there was no reason to fashion one; thus, state law should apply.[395] While this decision may be construed as validating the gap theory,[396] the more plausible explanation derives from the specific topic: "[The] history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties . . . . [Regulation of] insurance companies and contracts has been primarily a state function . . . ."[397] This outcome is also supported by the new guidepost. An insurance contract may include a choice-of-law provision. As the Court in *Wilburn Boat* noted, breach of warranty can be treated in various ways. Some states have prohibited forfeiture of insurance policies "in the absence of an insured's bad faith or fraud."[398] Other states thought this rule inadequately protected insureds and enacted "statutes like that of Texas which 'go to the root of the evil' and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured against."[399] The legal consequences of breach can be priced, so the use of choice-of-law provisions can offer potential insureds a menu of different levels of protection at different prices. One court protested that "maritime actors [are] faced with the laws of fifty jurisdictions when maritime insurance disputes arise," and that insurers and insureds have an incentive "to 'shop around' for the most favorable state insurance laws."[400] But as explained above, the ability to select applicable

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[391] 348 U.S. 310 (1955).

[392] *Id.* at 310.

[393] *Id.* at 312.

[394] *Id.* at 314–16.

[395] *Id.* at 314–16, 319–20.

[396] *See* Burrell, *supra* note 83, at 66. For an analysis of the gap theory, see *supra* notes 192–204 and accompanying text.

[397] *Wilburn Boat*, 348 U.S. at 316. Insurance remains the only financial industry in the United States not regulated on the federal level. *See* Ronen Perry, *Insurance Regulation: Lessons from a Small Economy*, 63 SMU L. REV. 189, 190 (2010).

[398] *Wilburn Boat*, 348 U.S. at 320.

[399] *Id.* (citing Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 253–54 (1906)).

[400] 5801 Assocs., Ltd. v. Cont'l Ins. Co., 983 F.2d 662, 665 n.8 (5th Cir. 1993).

law actually stimulates competition that can generate better law and facilitate human action and interaction.

I now turn to cases in which the legal result does not seem to conform to my thesis. In *Kossick v. United Fruit Co.*,[401] the Court discussed an oral agreement in which a shipowner promised a crewmember that if he accepted treatment at a public hospital, the owner "would assume responsibility for all consequences of improper . . . treatment."[402] Federal maritime law regards oral agreements as valid,[403] whereas the New York Statute of Frauds does not.[404] The Court found that the contract "may well have been made anywhere in the world," and was not a matter of local concern, so general maritime law must apply.[405] Seemingly, this decision does not conform to my normative argument: The parties to an employment contract can pre-select applicable law, hence uniformity is unnecessary and preemption is unjustified. Nonetheless, applying my thesis does not necessarily yield a different outcome in this particular case. The capacity to pre-select applicable law eliminates the need for uniformity, but in the absence of an actual choice-of-law provision the court needs to determine which law applies to the case in accordance with ordinary choice-of-law principles. This is essentially what the Court did in *Kossick*. It opined that "the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern."[406] It then explained that "several considerations point to an accommodation favoring the application of maritime law."[407] Even if the Court endorsed my view that uniformity should not have been an issue, the other considerations might still point in the same direction.

The earlier case of *Union Fish Co. v. Erickson*[408] presented a similar question. The master of a vessel sued the owner for breach of an oral employment contract.[409] The California Statute of Frauds provided that an oral agreement not performed within one year was invalidated.[410] The Court decided that California law was inapplicable.[411] To be sure, the Court reiterated its commitment to uniformity.[412] But it based this conclusion on the fact that the parties did not contemplate any services in California, but in Alaska, making

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401 365 U.S. 731 (1961).
402 *Id.* at 732.
403 *Id.* at 734.
404 *Id.* at 733.
405 *Id.* at 741–42.
406 *Id.* at 739.
407 *Kossick*, 365 U.S. at 741.
408 248 U.S. 308 (1919).
409 *Id.* at 311–12.
410 *Id.* at 312.
411 *Id.* at 314.
412 *Id.* at 313.

California law irrelevant, and on the assumption that the parties intended maritime law to apply.[413] So, once again, even if uniformity were taken off the table, as mandated by the new guidepost, the outcome would not necessarily change. Ordinary choice-of-law principles would probably exclude California law even without preemption, and although Alaskan law could have a strong claim to applicability, the Court might find that the parties implicitly selected federal maritime law.

3. *Torts*

Maritime tort law covers various types of harmful events, such as personal injuries and death of seamen, longshoremen, passengers and visitors; collisions and marine casualties; marine pollutions; and general average.[414] In a paradigmatic tort setting, pre-selection of applicable law is generally impractical, so uniformity is necessary and preemption is justified. For example, *Offshore Logistics, Inc. v. Tallentir*[415] involved a helicopter crash on the way from an offshore drilling platform to Louisiana.[416] Decedents' dependents brought wrongful death actions under the Death on the High Seas Act[417] and the Louisiana wrongful death statute.[418] The Court held that the federal statute preempted state wrongful death statutes.[419] This outcome is in line with my thesis. Dependents' right to recover for the wrongful death of maritime workers en route on the high seas cannot hinge on the fortuitous location of the accident. Of course, pre-selection of applicable law is impractical because maritime workers' relatives are not contractually related to potential wrongdoers. Therefore, uniformity is required and preemption is justified. Where pre-selection is impractical and no special reason to concede uniformity exists, preemption of state law conforms to the new guidepost.[420]

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[413] *Id.*

[414] *See* SCHOENBAUM, *supra* note 20, at 107, 121–23, 209–10, 320–22, 762–63 (discussing various categories of liability).

[415] 477 U.S. 207 (1986).

[416] *Id.* at 209.

[417] 46 U.S.C. § 30302 (2006).

[418] *Tallentire*, 477 U.S. at 209.

[419] *Id.* at 227, 232–33.

[420] *See, e.g.*, *In re* Amtrak "Sunset Limited" Train Crash, 121 F.3d 1421, 1426–27 (11th Cir. 1997) (discussing a collision between a towing vessel and a railroad bridge resulting in a fatal train accident; holding that Alabama's wrongful death statute could not apply because it conflicted with maritime law principles, e.g., by allowing punitive damages for mere negligence); Md. Dep't of Nat. Res. v. Kellum, 51 F.3d 1220, 1221, 1224, 1228 (4th Cir. 1995) (discussing injury to an oyster bar in Maryland waters caused when defendants' barge went aground; holding that federal fault-based liability rule preempts state strict-liability scheme); IMTT-Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1195 (5th Cir. 1993) (discussing economic loss incurred by the plaintiff following a collision between the defendant's ship and a third-party's dock during a maritime journey in Louisiana; holding

A different outcome might be justified where pre-selection is possible. In *Chelentis v. Luckenbach S.S. Co.*,[421] a seaman was injured at work and instituted a negligence action against the shipowner under New York common law.[422] Under general maritime law, a vessel owner is liable for the maintenance, cure and unearned wages of a seaman injured "in the service of the ship," regardless of fault,[423] but at that time a seaman could not bring an action against the owner for negligence.[424] The Court held that although maritime law rights can be enforced through state common law remedies under the "saving to suitors" clause, the rights and duties of the parties must be assessed under federal maritime law.[425] While *Chelentis* is a tort case, the parties were contractually linked and could pre-select applicable law. Thus, protecting vessel owners from additional liability through preemption of state common law seems redundant.[426]

Of course, the capacity to pre-select applicable law is not the only relevant consideration. In some types of cases pre-selection is impractical or impossible, but uniformity may be conceded for some other reason. In *Pope & Talbot Inc. v. Hawn*,[427] "a carpenter employed by an independent contractor was injured while working on a ship berthed on navigable waters in Pennsylvania."[428] The shipowner contended that plaintiff's own negligence contributed to his injuries.[429] Under Pennsylvania law contributory negligence barred recovery, whereas under general maritime law contributory negligence could only mitigate damages.[430] The Court found state law inapplicable: "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights . . . ."[431] The parties were not

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that *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925), whereby purely economic losses are irrecoverable, preempts state law).

[421] 247 U.S. 372 (1918).

[422] *Id.* at 378–79.

[423] *Id.* at 380–81; *see also* SCHOENBAUM, *supra* note 20, at 298–306.

[424] *Chelentis*, 247 U.S. at 381; *see also* SCHOENBAUM, *supra* note 20, at 210–11. Today, the Jones Act establishes a cause of action for negligence against an employer for an injury or death caused to a seaman in the course of employment. 46 U.S.C. § 30104 (2006); Gillespie v. U.S. Steel Corp., 379 U.S. 148, 154 (1964).

[425] *Chelentis*, 247 U.S. at 384; *see also* Stevens, *supra* note 22, at 252.

[426] Another case in which the parties could pre-select applicable law but state law was preempted is *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925). The Court held that in deciding whether a maritime employer was negligent towards an employee, the jury could not consider state safety regulations: "The rights and liabilities . . . arose out of . . . the general maritime law and could not be enlarged or impaired by the state statute." *Id.* at 457. On the other hand, in *Just v. Chambers*, 312 U.S. 383 (1941), the parties could pre-select applicable law, but the Court decided to apply the Florida survival statute to a maritime cause of action. *Id.* at 386–87, 391.

[427] 346 U.S. 406 (1953).

[428] *Id.* at 406.

[429] *Id.*

[430] *Id.* at 408–09.

[431] *Id.* at 409–10 (footnote omitted).

contractually linked, so pre-selection of the law applicable to their interaction was impractical, though not impossible. However, the activity was purely local, so subjecting the parties to Pennsylvania law could not significantly impair simplicity, certainty or fairness, or affect international relations. Preemption was unjustified because applying uniform rules to purely local activities was unnecessary. In *Hess v. United States*,[432] a carpenter employed by an independent contractor was killed while taking part in the repairs of a dam in Oregon navigable waters.[433] The Court held that an Oregon liability statute was applicable.[434] From a theoretical perspective the case was equivalent to *Pope & Talbot* because the parties could not pre-select applicable law and uniformity was nonetheless unnecessary given the purely local nature of the event.[435] The outcome, therefore, seems justified.

Similarly, *Askew v. American Waterways Operators, Inc.*[436] discussed the interplay between federal and state law regarding marine oil pollution. A federal statute imposed liability for oil spill cleanup costs incurred by the federal government.[437] The Florida Oil Spill Prevention and Pollution Control Act imposed strict liability for any damage incurred following an oil spill in state territorial waters.[438] The Court concluded that state law was not implicitly preempted by the federal statute.[439] To be sure, pre-selection of applicable law was impossible, so uniformity was supposedly warranted under the proposed guidepost. But preemption of state law was not justified for other reasons. At the time, federal law did not provide a remedy for private losses consequent on marine oil pollution. Without state remedies, private victims could not recover at all. This was a very troubling lacuna that preemption would have sustained.

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[432] 361 U.S. 314 (1960).

[433] *Id.*

[434] *Id.* at 318–21.

[435] "Graham's death and the wrongful act or omission which allegedly caused it occurred within the State of Oregon . . . ." *Id.* at 318. Moreover, the activity in which the decedent was involved was local. Another case in which the parties could not pre-select applicable law, but uniformity was probably unnecessary due to the local nature of the incident is *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921). The Court applied California wrongful death statute to a stevedore's death in California, emphasizing that "[t]he subject is maritime and local in character . . . ." *Id.* at 242. An additional example is *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 213–16 (1996). A girl was killed while riding a jet ski on vacation in Puerto Rican waters. Her parents sued the jet ski manufacturer and sought to supplement remedies available under maritime law through Pennsylvania law. *Id.* at 201–02. The Court found that the maritime judge-made cause of action for wrongful death was not intended to be comprehensive, so it did not displace state wrongful death statutes. *Id.* at 213–16. Again, pre-selection of applicable law was impossible, but the situation was local and had nothing to do with maritime commerce. *See* Burrell, *supra* note 83, at 75–76.

[436] 411 U.S. 325 (1973).

[437] *Id.* at 328.

[438] *Id.* at 327.

[439] *Id.* at 328, 336, 344.

IV. CONCLUSION

The Admiralty Clause and the Judiciary Act grant jurisdiction to the federal courts with respect to maritime matters, but give state courts concurrent jurisdiction. From these jurisdictional grants, and possibly other sources, concurrent federal and state lawmaking powers derive. The coexistence of these powers triggers preemption disputes. The exact boundaries of state maritime lawmaking power have been the subject of extensive judicial and scholarly debate, but remain somewhat obscure. The question of liability for economic loss arising from marine oil pollution illustrates the confusion. This Article has set forth and defended an original guidepost that can help determine whether preemption is called for in various types of maritime cases, and has demonstrated that this policy-driven guidepost can support a straightforward judicial heuristic.

The structure of the main argument may be summarized as follows. The purpose of the Admiralty Clause was to maintain uniformity of maritime law within the United States. Recognition of federal lawmaking powers and preemption of state law are seemingly required to achieve this constitutional goal. However, uniformity is not the ultimate end. It is a means for the protection of more fundamental federal interests. Because preemption serves uniformity, and uniformity serves other goals, preemption can only be justified to the extent that it fulfills the goals underlying the desire for uniformity. Thus, an inverse relation should exist between the preemptive force of federal maritime law in a particular type of case and litigants' capacity to pre-select the law applicable to their situation. If the parties can pre-select applicable law, the objectives usually associated with uniformity can be achieved without compelled uniformity, hence without preemption of state law. An additional justification for this principle rests on the concept of regulatory competition. In the absence of a unification mechanism, and if private selection of applicable law is permitted, various legal systems can compete over the terms offered to commercial actors, thereby generating better law.

This Article has shown that the proposed guidepost supports a qualified distinction between contract and tort cases in maritime preemption analysis, but mandates the opposite result from that advocated by Currie and van Boom. In a paradigmatic contractual setting, the parties can incorporate a choice-of-law provision into their contract, so there is no need for uniformity. In a paradigmatic tort case the parties may have been complete strangers prior to the accident, so private choice of law is less likely and the need for uniformity arises. If my thesis holds, the case for preemption in maritime tort law is generally stronger than in maritime contract law. This can serve as a judicial heuristic in maritime preemption analysis and possibly as a general guideline in various types of unification projects, subject to a few qualifications.

The reader may correctly observe that the proposed theoretical framework has a partly covert assumption, namely that state autonomy ought to be retained by default. Put differently, state sovereignty should not be trumped in the

absence of a very persuasive reason, and only to the extent that this reason is valid. A comprehensive defense of this assumption transcends the scope of this Article. Suffice it to say that it has underpinnings in American constitutional law and political tradition, and strong policy-based justifications.[440] Of course, one who believes that a high degree of centralization is politically warranted, irrespective of the direct advantages of uniformity of private law, may find a sophisticated delineation of the proper ambit of private law unification less expedient.

Although the importance of this Article with respect to maritime preemption analysis in the United States is evident, it may also be useful in other contexts and in comparable political unions. As a prominent author once observed, maritime preemption discourse may contribute "to the solving of other of the constantly recurring and more inflammatory issues having to do with the relations of the federal government and the several states."[441] For example, the new guidepost may be used in general preemption analysis to assess congressional intent in the absence of express preemption. Moreover, as this Article offers a general theory of unification, it may assist scholars and policymakers engaged in unification and harmonization projects in the United States and other federal and transnational systems, like the European Union.[442] The unification debate on both sides of the Atlantic has revolved mainly around the proper content of uniform laws. So far, very few attempts have been made to provide theoretical analyses of the merits and limits of unification per se. This Article helps fill the troubling theoretical gap.

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[440] *See, e.g.*, U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Epstein, *supra* note 288, at 1010 (recognizing "a default provision against the federal intervention in internal state activities in the absence of a clear statement to the contrary in any federal law"); Nelson, *supra* note 130, at 229 ("[C]onservative advocates of federalism and liberal advocates of government regulation have joined in arguing that the current tests for preemption risk displacing too much state law."); Verchick & Mendelson, *supra* note 148, at 15–18 (discussing possible justifications for preserving state regulatory authority); *see also supra* notes 115–18, 134–35, 344–46 and accompanying text (discussing the role and importance of state regulation in the United States).

[441] DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM 5 (1970) (quoting Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 261 (1950) (internal quotation marks omitted).

[442] Considerable efforts to unify or at least harmonize private law in the European Union have been underway in recent years. *See, e.g.*, PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCES (Christian von Bar et al. eds., 2009); EUROPEAN GRP. ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY (2005); Helmut Koziol, *Comparative Law—A Must in the European Union: Demonstrated by Tort Law as an Example*, 1 J. TORT L. 5, *passim* (2007).